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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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ROGER D. MONROE, PETITIONER

*v.*

THE STANDARD OIL COMPANY

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## QUESTION PRESENTED

Whether the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, are violated when a reservist is denied an employment benefit solely because attendance at a military training exercise necessitates his absence from work on a particular day.

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The Solicitor General, on behalf of Roger D. Monroe,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–13a) is reported at 613 F.2d 641. The opinion of the district court (App. D, *infra*, 17a–26a) is reported at 446 F. Supp. 616.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 14a–15a) was entered on January 24, 1980. A petition for rehearing was denied on April 15, 1980 (App. C, *infra*, 16a). On July 8, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 28, 1980 (App. E, *infra*, 27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

38 U.S.C. 2021(b)(3) provides in pertinent part:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

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[1] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

## STATEMENT

1. Petitioner is a full-time employee at respondent's Lima, Ohio refinery. The refinery operates 24 hours per day, seven days per week, and the work day is divided into three eight-hour shifts. Respondent schedules each employee to work five eight-hour days per week, generally in succession, but with a different five-day period each week (App. D, *infra*, 18a). The collective bargaining agreement in force at the refinery permits employees to exchange scheduled work hours with other employees, provided that no overtime obligation is incurred by respondent as a result of the change (App. A, *infra*, 3a).

During the period involved in this action, petitioner was a member of the United States Army Reserve, and his military obligations required him periodically to attend training sessions with his unit, ordinarily on weekends (App. A, *infra*, 2a). See 10 U.S.C. 270(a)(1). Respondent took no cognizance of petitioner's reserve obligations in scheduling shifts and therefore often scheduled him to work as part of his five-day week on days on which he was obligated to attend reserve training sessions. In 1975 and 1976, respondent scheduled petitioner to work on 28 days on which he had military obligations. On four of those days petitioner was able to exchange shifts with other employees. On the other 24 days he was unable to arrange any exchange, and therefore he worked and was paid for fewer than 40 hours in the corresponding week. As a result, petitioner lost a total of 192 hours of work and salary in this two-year period (App. A, *infra*, 3a).

2. Petitioner brought this action in the United States District Court for the Northern District of Ohio claiming that respondent's failure to attempt to schedule his work days to avoid a conflict with his military obligations violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* Specifically, he claimed that respondent had violated 38 U.S.C. 2021(b)(3), which provides that no employee shall be denied "any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."[2] Petitioner contended that respondent, in making no attempt to schedule his work to avoid a conflict with his military obligations, denied him the right to work a 40-hour week, an "incident or advantage of employment" within the meaning of the Act, because of his Reserve obligations.

The district court granted petitioner's motion for summary judgment based upon a stipulated set of facts (App. D, *infra*, 17a-26a). The court found that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" (*id.* at 24a). Accordingly, the court held that the Act required respondent to make an accommodation in its scheduling to account for petitioner's military obligations. In so holding, the court explicitly rejected respondent's contention that the Act required only that an employer treat all of its employees in a neutral fashion. Rather, because of the importance of a

[2]This provision was added to the veterans' reemployment rights provisions in 1968 as 50 U.S.C. App. (1970 ed.) 459(c)(3) and was recodified in 1974 as 38 U.S.C. 2021(b)(3).

properly trained military force to the security of the nation, the statute requires "positive action" on the employer's part to avoid the denial of advantages of employment to reservists (*id.* at 24a-25a). The court entered judgment for petitioner for $1,086.72, the amount of wages lost as a result of respondent's wrongful failure to attempt to accommodate petitioner's reserve obligations during the period at issue (*id.* at 26a).

The court of appeals reversed (App. A, *infra*, 1a-13a). The court agreed with the district court's finding that the right to be scheduled for 40 hours of work per week was an "incident or advantage" of petitioner's employment (*id.* at 7a-8a). But the court of appeals held that a condition precedent to the exercise of the right to work 40 hours was petitioner's presence at work on the scheduled days (*id.* at 10a, 12a). The court recognized that petitioner could not be present on some of those days because of his reserve obligations, but it held that the Act offered no protection against the adverse consequences of these absences. Rather, the court held, the Act protects reservists only against "intentional unequal treatment" or "on-the-job bias" by their employers (*id.* at 10a, 11a). Hence, the Act is satisfied if "collective bargaining agreements and employment rules [are] facially neutral and [are] applied uniformly and equally to all employees" (*id.* at 11a). The court found that this test was met in this case because petitioner's absences were treated just as non-military absences of other employees would have been treated (*id.* at 11a-12a). The court of appeals dismissed the district court's holding that the Act requires accommodation of the reservist's schedule as a

"fashioning of exclusive preferential rights" for the reservist that is without support in the statute (*id.* at 10a, 13a.)

## REASONS FOR GRANTING THE PETITION

1. As the court of appeals recognized (App. A, *infra*, 12a–13a), its decision is in direct conflict with the Fifth Circuit's decision in *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (1980). The facts in *West* are virtually indistinguishable from those in the case at bar. All employees were guaranteed a 40-hour work week, but West, a National Guardsman, was not always able to work 40 hours because his monthly weekend training obligation sometimes conflicted with his employment schedule. The Fifth Circuit held that the employer's refusal to attempt to accommodate West's military obligations in its scheduling was a violation of the Act.

The interpretation given to 38 U.S.C. 2021(b)(3) by the court below also conflicts with that adopted by two other circuits in similar cases. In *Carney* v. *Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), cert. denied, No. 79-757 (Feb. 19, 1980), the court held that the employer violated the Act in charging a National Guardsman with missed overtime opportunities on days that he was absent from work because of his military obligations. The Seventh Circuit cited the district court's decision in this case with approval (602 F.2d at 766 n.1), and the court below, although agreeing with the result in *Carney* on another ground, recognized that its interpretation of the statute was inconsistent with that in *Carney* (App. A, *infra*, 13a). In *Carlson* v. *New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), cert. denied, No. 79-1331 (Apr. 21, 1980), a

reservist was transferred to a less desirable assignment for reasons related to his military obligations. The First Circuit rejected the defendant's argument that the reservist was being treated just as any other employee who had non-military absences and, relying in part on the district court decision in this case, held that the requirements of the Act were not satisfied by treating military obligations the same as personal leaves of absence. 609 F.2d at 1027.

It is important that this conflict in the circuits be resolved. In addition to the four recent appellate decisions discussed above, the Department of Labor reports that 66 cases involving possible violations of 38 U.S.C. 2021(b)(3) are now pending in the federal courts or are under investigation.[3] Moreover, as of April 1980, there were approximately 830,000 ready reservists in the nation's armed forces, many of whom are employed in civilian jobs. *Official Guard and Reserve Manpower Strength and Statistics (Reserves not on Active Duty)*, prepared by the Office of the Deputy Assistant Secretary of Defense (Reserve Affairs), Report No. 1147/1148 (May 31, 1980). It is essential that these reservists and their employers understand their respective rights and obligations under the Act.[4] As the law presently stands, the rights of a reservist will

[3] Twenty-two of these cases concern the precise issue presented here, scheduling of work hours in conflict with reserve obligations.

[4] Moreover, in light of the "increased reliance on Reserve forces for the national defense of our country," *Peel* v. *Florida Dep't of Transportation*, 443 F. Supp. 451, 459 (N.D. Fla. 1977), aff'd, 600 F.2d 1070 (5th Cir. 1979), it is important for recruitment that potential enlistees in the Reserves understand their rights under the Act.

vary depending upon whether or not he is employed—even by the same employer—in the Sixth Circuit.

2. In addition to creating a conflict in the circuits, the court of appeals' narrow interpretation of the Act is erroneous. The plain language of the statute prohibits the denial of any "incident or advantage of employment" to a reservist because of his military obligations. Because petitioner was denied the opportunity to work a 40-hour week as a result of his training commitment, the statute has been violated. Nothing in the language of the statute suggests that its scope is restricted to actual discrimination against reservists *per se*, which will occur only rarely. Indeed, the focus of the statute on a reservist's obligations, rather than simply on his status as a reservist, supports the view that the statute is aimed at a more pervasive problem—facially neutral rules that adversely affect reservists because of the schedule constraints imposed upon them by their training requirements.

The legislative history of 38 U.S.C. 2021(b)(3) lends further support to this interpretation. The statute was enacted in order to protect reservists against "[e]mployment practices which disadvantage employees with Reserve obligations." H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968). The reason for affording such protection was clearly stated in the House Committee Report issued when the bill was first introduced, which explained that "[i]f these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the

minimum extent possible." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).[5] Thus, it was clearly Congress' intent that employers be required not only to refrain from overt discrimination against reservists, but also to take positive action to minimize the economic disadvantages that their employment practices impose upon reservists, even if those practices are not adopted or applied with a discriminatory intent.

Moreover, the court of appeals' view that facially neutral rules necessarily satisfy 38 U.S.C. 2021(b)(3) is completely contrary to the basic principles of the veterans' reemployment rights provisions of the Act. Congress has acted to place military service, including service in the Reserves, in a special category. Thus, a veteran returning from military service is entitled by statute to certain benefits in his civilian employment notwithstanding the fact that employees on nonmilitary leaves of absence would not accrue those benefits. See *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 7; *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 591 (1977).

The court of appeals is therefore incorrect in characterizing petitioner's claim as one for "exclusive preferential rights" (App. A, *infra*, 10a). Petitioner seeks only to be treated the same as other employees who are not required to be absent from work in order to attend military training, and Congress has conferred the right to such treatment upon him. The "prefer-

[5] This report accompanied H.R. 11509, which contained what is now 38 U.S.C. 2021(b)(3). The bill passed the House, but not the Senate, in the 89th Congress. The provision was enacted in identical form by the 90th Congress.

ence" identified by the court of appeals is no preference at all because it results in no advantage for a reservist over his fellow employees. Both petitioner and his fellow employees have the same right—the opportunity to work a 40-hour week unless absent from work for reasons unrelated to military service. Congress has simply determined that a reservist is not to be unnecessarily penalized for the time that he must spend on military duty rather than at work. See *Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060, 1067 n.7 (S.D. Fla. 1978).[6] As the Fifth Circuit stated in *West* v. *Safeway Stores, Inc.*, *supra*, 609 F.2d at 149:

> The essence of reserve duty in this context is absence from work. If employers could * * * require that workers be present in order to receive certain benefits, then reservists could never secure the benefits or advantages of employment which the Act was designed to protect.

Under the interpretation of the court below, the protection afforded to reservists by 38 U.S.C. 2021(b)(3) "would be effectively annulled." 609 F.2d at 149. Particularly in light of the long-established rule that the reemployment rights provisions of the Act are "to be liberally construed for the benefit of those who

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[6] It is not disputed that respondent could have arranged its schedule so that petitioner could work 40 hours during the week he had reserve duty (see App. D, *infra*, 25a). The Act requires respondent to take reasonable steps to accommodate the reservist. If it is impossible to make such an accommodation, the Act does not require the reservist to be paid for hours he does not work. See *West* v. *Safeway Stores, Inc.*, 609 F.2d at 150 n. 8. Here, respondent made no effort to accommodate petitioner.

left private life to serve their country," *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), the court of appeals' decision should not be allowed to stand.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1980

APPENDIX A

No. 78-3233

# In the United States Court of Appeals

## FOR THE SIXTH CIRCUIT

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ROGER D. MONROE, PLAINTIFF-APPELLEE,

*v.*

THE STANDARD OIL COMPANY,
DEFENDANT-APPELLANT.

APPEAL from the United States District Court for the Northern District of Ohio.

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**Decided and Filed January 24, 1980.**

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Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This is an appeal by the defendant-appellant, The Standard Oil Company (Sohio), from a summary judgment of the district court granting plaintiff-appellee recovery of wages for time spent attending military reserve meetings during his regularly scheduled work hours.[1] Recovery was predi-

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[1]The district court opinion is reported at 446 F. Supp. 616 (N.D. Ohio 1975).

cated on 38 U.S.C. § 2022 and § 2021(b)(3) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

The case was submitted to the trial judge by counsel for the parties on a stipulation of facts.

During the years 1975 and 1976, the years in which Sohio allegedly violated the Act, plaintiff-appellee, Roger D. Monroe was a full-time employee of Sohio at its Lima, Ohio, refinery. He was also a member of a unit of the Army Reserve and was required to train with his unit on the third weekend of each month and during the last two weeks of August each year.

Throughout the two years in question, Sohio operated its Lima refinery twenty-four hours per day, seven days per week. The work day was divided into three eight-hour shifts. Sohio rotated its employees' shifts. All employees were scheduled to work five eight-hour days in a row per week, but with a different five-day sequence each week. Under this system, weekend work was distributed equally among employees in the course of a year.

Appellant scheduled Monroe to work a full forty hours each week. Sohio periodically slated appellee to work Saturdays and/or Sundays just as it did Monroe's fellow employees. Except for normal time off and the absences for inactive military reserve training in issue here, plaintiff customarily worked his scheduled forty-hour weeks with occasional overtime.

Employment at the Lima refinery was governed by a collective bargaining agreement between appellant and the Ohio Chemical and Atomic Workers Interna-

tional Union during the pertinent period. Article V, ¶ 23 of that agreement provided:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

On four occasions during 1975 and 1976, Monroe was able to change shifts with his fellow employees to accommodate his reserve training and still work a forty-hour week. On twenty-four other days when he was required to train, however, appellee was unable to arrange for an exchange of shifts with other employees. As a result of his absence from the refinery on these days, appellee lost a total of 192 hours of work for which he was not compensated.

Sohio took no steps to provide Monroe with substituted hours or to make up for appellee's lost working time, other than as provided by Article V, ¶ 23 of the collective bargaining agreement. In this regard, Monroe was treated the same as all other Sohio employees under the agreement.

Monroe brought this action against Sohio pursuant to 38 U.S.C. § 2022, asserting that Sohio had violated §§2021(b)(3) and 2024(d) of the Act by refusing to rearrange his work schedule to allow him to work a full forty hours per week during those weeks when his military reserve obligation otherwise precluded him from working a full forty hours.

The cause was submitted on the parties' cross-motions for summary judgment. The district court deemed the issue to be whether plaintiff was denied "an incident or advantage of employment," 38 U.S.C. § 2021(b)(3), "when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would." The court determined *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975), *appeal dismissed*, No. 75-2324 (6th Cir. January 21, 1976), to be dispositive of the issue. Sustaining plaintiff's cross-motion for summary judgment, the district court held that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" and awarded plaintiff $1,086.72 for wages lost on those "workdates when an accommodation should have been made." This appeal followed.

Appellant contends that it is under no obligation to schedule plaintiff additional working hours or pay him for hours not worked. Sohio further claims that any obligation it owed Monroe was satisfied when it scheduled him to work forty hours per week and granted him the right to switch hours with other employees. We agree.

We begin by looking at two sections of the Act, both of which govern reemployment rights of reservists.

Title 38 U.S.C. § 2024(d) provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in

> the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. . . .

Originally enacted in 1960 as 50 U.S.C. § 459g(4), section 2024(d) extended, for the first time, the rights set forth therein to reservists "who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training periods. . . . S. Rep. No. 1672, 86th Cong., 2d Sess. 2, *reprinted in* (1960) U.S. Code Cong. & Ad. News 3077, 3078.

Section 2024(d) guarantees terms and conditions of reemployment to reservists returning from inactive duty training. It does not, however, protect reservists from discrimination by their employers between training assignments. In the years following the enactment of § 2024(d), discriminatory employment practices intensified. Congress responded by passing what is now 38 U.S.C. § 2021(b)(3)[2] to remedy this problem. Title 38 U.S.C. § 2021(b)(3) reads in pertinent part:

> Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces.

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[2] Formerly, 50 U.S.C. § 459(c)(3).

The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said:

> Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions . . . or discharged because of [their training obligations]. [Section 2021(b)(3)] is intended to protect members of the Reserve . . . from such practices. It provides that these reservists will be entitled to the *same treatment afforded their coworkers* not having such military obligations. . . . [emphasis added] S. Rep. No. 1477, 90th Cong., 2d Sess, *reprinted in* (1968) U.S. Code Cong. & Ad. News 3421, 3421.

*Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975), *appeal dismissed*, No. 75–2324 (6th Cir. January 21, 1976), relied on by the district court, was one of the first cases to interpret section 2021(b)(3). In *Lott*, the court held that the opportunity to work overtime hours qualifies as an incident or advantage of employment protected by section 2021(b)(3), and ruled that a reservist may not be charged for overtime hours that he is forced to refuse because of his military training obligations.

The union contract that controlled overtime scheduling in *Lott*, *supra*, provided that an employee could refuse offered overtime, but he would be "charged" as if he had worked the scheduled overtime, even if his nonacceptance was due to reasons beyond his control, such as sickness or personal business. The plaintiff in *Lott* missed overtime opportunities on two

occasions because of his required attendance at reserve meetings. He was charged for the overtime refused in accordance with the collective bargaining agreement. The *Lott* court rejected the employer's argument that since the contract was neutral on its face and was applied neutrally by the defendant, plaintiff was being treated equally with his co-workers as required by section 2021(b)(3). The court reasoned that to permit the application of the contract provision with equal force to all employees, including military reservists, "would permit a collective bargaining agreement to nullify the express protections of section [2021(b)(3)]." 395 F. Supp. at 869–870. Finding that the defendant's nonreservist employees were charged only if they "voluntarily" refused overtime, the district court held that the employer was required to accommodate the plaintiff by making missed overtime opportunities available to him.

Based on its reading of the *Lott*, *supra*, decision, the district court in the present case had "no trouble in holding that being scheduled for a full forty hour week . . . constitutes an incident or advantage of employment" and finding Sohio liable to the plaintiff "for those work dates when an accommodation should have been made." Explaining its holding, the court stated that section 2021(b)(3) "does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations. . . ." We disagree.

We do not dispute the district court's holding that plaintiff had a right to be scheduled to work forty

hours a week and that this right is an incident or advantage of employment within the meaning of section 2021(b)(3). We reject, however, the district court's conclusion that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded to their fellow employees.

As a starting point in our analysis, we note that we are required "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of a veteran as a harmonious interplay of the separate provisions permit." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Title 38 U.S.C. §§ 2024(d) and 2021(b)(3) are complementary and must be read together to understand the breadth of and limits to reemployment rights granted to reservists.

Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aiello* v. *Detroit Free Press, Inc.*, 570 F.2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.

Section 2021(b)(3), on the other hand, does not enumerate the incidents or advantages of employment that it safeguards. The protection afforded by this section is purely derivative. It is intentionally framed in general terms to encompass the potentially limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns. But, just as the property rights protected by the Due Process Clause of the Fourteenth Amendment can only be ascertained by looking outside the Amendment to state law, we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment.

In the case at bar, two incidents or advantages of employment were established: the right to be scheduled for a full forty-hour workweek and the right to exchange shifts with other employees if mutually agreeable to the employees involved and approved by the shift foreman. The record does not reveal whether the right to be scheduled for a forty-hour workweek was guaranteed by the collective bargaining agreement. The parties stipulated, however, that all employees, including the appellee, were customarily scheduled for that number of hours. We believe this to be sufficient to establish an employment practice as an incident or advantage of employment. The right to exchange shifts was provided for under the terms of the union contract then in effect. Unquestionably, the right qualifies for section 2021(b)(3) protection as well.

There was no unconditional right to work forty hours a week at defendant's refinery. The right to work forty hours was contingent upon the employees' presence and ability to perform at their regularly scheduled work periods, or, in the alternative, upon successfully arranging to change scheduled working time with other employees. Thus, unless the appellee was denied the right to be scheduled for forty hours a week or denied the right to exchange shifts "because of any obligation as a member of a reserve component of the Armed Forces," § 2021(b)(3), *supra*, no violation of section 2021(b)(3) occurred.

Section 2021(b)(3) provides that incidents or advantages of employment may not be "denied . . . because of any [military obligation]." This clause is subject to two interpretations in cases such as this. First, it can be read to mean that any time an employee's forced absence for reserve duty requires him to forgo a benefit that would have accrued to him only if he had been present for work, he has been "denied" an incident or advantage of employment "because of" his military obligation. This is the interpretation subscribed to by the court in the instant case and the court in *Lott* v. *Goodyear Aerospace Corp.*, *supra*, 395 F. Supp. 866. Under this view, employers have a duty to alter their employment rules, which may necessitate the fashioning of exclusive preferential rights, to accommodate reservist-employees' military training obligations. An employer must shoulder this burden even though the detriment to the reservist is a direct consequence of his military undertaking and not the result of intentional unequal treatment by his employer. We believe such an interpretation ignores the legislative history of

the Act and requires a tortured reading of section 2021(b)(3).

The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be "entitled to the same treatment afforded their coworkers not having such military obligations." S. Rep. No. 1477, *supra*, at 3421. We find no support in the legislative history of this section for the view that reservists are to receive preferential treatment; only that they must not be subjected to on-the-job bias by their employers because of their prospective military obligations.

In the absence of a clear and unambiguous statutory mandate to the contrary, we hold that section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations. To meet this requirement, collective bargaining agreements and employment rules must be facially neutral and must be applied uniformly and equally to all employees.

The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees.

The condition precedent to plaintiff's right to work forty hours, as opposed to being scheduled to work forty hours, was never satisfied. The right to work forty hours was contingent on appellee's being present for work or arranging to switch shifts. On twenty-four occasions, appellant was unable to do either. His inability to exchange shifts was not due to unequal treatment by the appellant but attributable to the lack of cooperation on the part of his fellow employees. Nor were Monroe's absences on these occasions the result of disparate employment practices designed to deny appellee the right to be present for work because of his status as a member of the military reserve. Monroe was absent because he had to attend reserve training. Appellant was required to grant appellee a leave of absence on these days, and it did. It was not required to do more. Thus, the right to work forty hours during the weeks in question did not vest. Since there was no right to work forty hours during these weeks, there was no incident or advantage of employment protected by § 2021(b)(3) that was "denied . . . because of any obligation as a member of a reserve component of the Armed Forces." Sec. 2021(b)(3), *supra*. *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980), involved a suit similar to the case at bar. There, the collective bargaining agreement guaranteed employers the right to work forty hours a week conditioned upon their presence at work. Interpreting § 2021(b)(3) to require that such agreements be construed as if an absent employee is "constructively present" on those days he has reserve training, the Fifth Circuit held that the employer was required to accommodate the plaintiff by rescheduling him during those weeks when

he was absent for reserve duty. We find nothing in the legislative history or the statute to support judicial invalidation of nondiscriminatory conditions precedent to employee benefits and adhere to our belief that conditional benefits are protected by § 2021(b)(3) only to the extent that the conditions have been actually satisfied.

We believe the result reached in *Carney* v. *Cummins Engine Co., Inc.*, 602 F.2d 763 (7th Cir. 1979), is consonate with the result here, though we choose not to adopt fully that court's rationale. In *Carney*, the Court of Appeals for the Seventh Circuit affirmed a district court judgment that a collective bargaining agreement suspending the right of reservists to be paid for accrued overtime when transferring departments was violative of section 2021 (b)(3), where other employees were not denied this benefit upon transfer. We agree with the court that the collective bargaining agreement was no defense in that instance, since the contract provision at issue clearly discriminated against reservists. We decline to adopt the courts further reason for affirmance, however, insofar as the court appears to hold that the right to overtime opportunities is conferred by statute rather than by employment contract or practices.

For the foregoing reasons, we reverse the judgment of the District Court and remand the case with instructions to dismiss the complaint.

APPENDIX B

# In the United States Court of Appeals

## FOR THE SIXTH CIRCUIT

No. 78-3233

---

ROGER D. MONROE, PLAINTIFF-APPELLEE,

*v.*

THE STANDARD OIL COMPANY,
DEFENDANT-APPELLANT.

---

[Filed Jan. 24, 1980]

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

### JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss the complaint.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as

itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by order of the Court.

/s/ JOHN P. HEHMAN
Clerk

A True Copy.

Attest:
/s/ DOROTHY J. PHELAN
Deputy Clerk

Issued as Mandate: May 1, 1980

COSTS: None

Filing Fee ..... $ .....
Printing ..... $ .....
Total ..... $ .....

APPENDIX C

No. 78-3233

# In the United States Court of Appeals

## FOR THE SIXTH CIRCUIT

ROGER D. MONROE PLAINTIFF-APPELLEE

*v.*

THE STANDARD OIL COMPANY
DEFENDANT-APPELLANT

---

**ORDER**

---

[Filed Apr. 15, 1980]

Before: CELEBREZZE and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

Plaintiff-appellee's petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit.

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court

APPENDIX D

# In The United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C 76-71

ROGER D. MONROE,

PLAINTIFF,

*v.*

THE STANDARD OIL COMPANY,

DEFENDANT.

---

## OPINION AND ORDER

---

YOUNG, J:

This cause came to be heard upon the motion of defendant for summary judgment and upon cross-motion of plaintiff for summary judgment. This Court is presented with an issue of apparent near first impression regarding the relationship of a member of the Army Reserve to his civilian employer. The parties have aided the determination of this cause by stipulating a series of facts.

## I. *FACTUAL BACKGROUND*

At all times herein, plaintiff is a member of a unit of the Army Reserve. Plaintiff is required to train with his unit one weekend per month, and must spend two weeks per year training, usually in the summer. Stipulation of Facts ¶ 22. In addition to his military service, plaintiff is a full time employee at the defendant's refinery in Lima, Ohio. Customarily, plaintiff works a full forty hour week except when he is absent from his civilian employment for personal reasons, vacation, sick leave, or military leave. Stipulation of Fact ¶¶ 3–5.

The refinery at Lima operates on a twenty-four hour per day schedule seven days per week. Each day is divided into three working shifts. Scheduling of employees is done in such a way that an employee such as plaintiff works various days of the week, although generally for five days in succession. On a given week, an employee might work Monday through Friday, while at other times he might work Tuesday through Saturday, Wednesday through Sunday, and so on. Thus, the impact of such a scheduling system is to give the employee forty hours of regularly scheduled work while at the same time requiring him to work certain weekends and correspondingly to take his days off during the week.

At all times herein, employment at the Lima refinery has been governed by a collective bargaining agreement between the defendant and the Oil, Chemical and Atomic Workers International Union. Stipulation of Facts 6. Article V, ¶ 23 of that agreement provides:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager. Stipulation of Fact ¶ 7.

It is further stipulated between the parties that plaintiff was treated no differently in terms of work scheduling than other employees. Stipulation of Fact ¶ 11. Plaintiff, thus, had the right to change shifts if he found another employee willing to change. Stipulation of Fact ¶ 11. In the event a particular employee is absent from his work assignment, defendant's practice is to bring in a replacement, and during 1975 and 1976, there were occasions when such extra employees were needed. Stipulation of Fact ¶¶ 20–21.

On four different occasions in 1975 and 1976, when plaintiff was scheduled to work at the same time as he was required to attend military reserve training, he was able to exchange shifts with other employees so that he retained a full forty hour work-week. Stipulation of Fact ¶ 12. On the following days, however, plaintiff was required to attend military reserve training and was not able to exchange shifts and for

that reason was absent from his assigned refinery position:

*1975:* May 10, 11
June 14, 15
August 1
September 6
October 3, 4
November 7
December 7

*1976:* January 9, 10, 11, 17, 18, 23, 24, 25
February 7, 8
March 6
June 6
July 17, 18

Stipulation of Fact #13. Thus, by missing 24 days of work over the two year period, plaintiff has missed a total of 192 hours of work for which he was not compensated. Stipulation of Fact ¶15. Plaintiff here is seeking damages from the defendant in the amount of wages which would have been earned on the missed days. Plaintiff's hourly wage rate for the time missed was $5.66. Stipulation of Fact ¶ 16.

Defendant's position is that it is not required to schedule the plaintiff for additional hours of work or to pay him for hours not worked. In other words, defendant claims that if it owed any obligation to plaintiff, that obligation was satisfied when the defendant scheduled plaintiff to work and when plaintiff was able to exchange shifts pursuant to the collective bargaining agreement.

## II. *STATUTORY BACKGROUND*

Title 38, U.S.C. § 2021(b)(3)[1] provides:

> Any person who holds a position in Clause (A) or (B) of subsection (a) of this section (including a person in the employ of a private employer) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The defendant here is an employer within the meaning of the statute. The issue presented to the Court is whether plaintiff was denied an incident or advantage of employment when he was unable to exchange shifts with another employee and therefore was unable to work a full forty hour week as employees without military obligations would.

The legislative history of the statute was examined by the United States District Court for the Northern District of Ohio, Eastern Division, when it was called upon to decide a similar issue. *See, Lott* v. *Goodyear Aerospace Corporation*, 395 F. Supp. 866, 868 (N.D. Ohio 1975). The intent and purpose of the bill is "to prevent Reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership. . . ." S. Rep. No. 1477, 90th Cong., 2d Sess, at 1–2, U.S. Code, Cong. & Admin. News, p. 3421 (1968). The senate Report states:

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[1] What is now 38 U.S.C. § 2021(b)(3) was formerly 50 U.S.C. App. § 459(c)(3). The recodification took place on December 3, 1974, pursuant to P.L. 93-508.

> It (the bill) provides that these reservists will be entitled to the same treatment afforded their co-workers not having such military obligations by requiring that employees with Reserve obligations "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces of the United States." S. Rep. No. 1477, 90th Cong., 2d Sess. at 2, U.S. Code, Cong. & Admin. News, p. 3421 (1968).

*Lott* v. *Goodyear Aerospace Corporation*, *supra*, is one of the few authorities cited by the parties. In *Lott*, a reservist brought an action against his employer which sought to challenge the employer's practice of "marking up" an employee for overtime because the employee could not take advantage of the overtime due to military obligations. Although overtime was voluntary, the overtime scheduling system was designed in such a way that overtime would be equalized as nearly as possible between employees. 395 F. Supp. at 867. On several occasions military reserve obligations prevented plaintiff from working overtime as he had been scheduled. By "marking up" plaintiff for overtime, the company counted plaintiff as having worked those hours for scheduling purposes although he was not paid for them. 395 F. Supp. at 868. Further overtime apparently was scheduled for the plaintiff as if he had worked the originally scheduled overtime hours. The District Court in *Lott* held that the employer's practices violated the act.

Plaintiff has also directed this Court to the unreported case of *Hanning* v. *Kaiser Aluminum*, No.

76–547 (E.D. La. June 29, 1977). There, plaintiffs, in addition to belonging to a reserve Coast Guard unit, worked as welders for defendant. Plaintiffs were granted leaves of absence to attend the yearly two-week training period. The July 4th holiday fell during the two-week period and the company refused to pay each plaintiff for that holiday because neither had worked during the payroll week immediately prior to the holiday as required by the applicable collective bargaining agreement. The Court there held that the employees were entitled to the holiday pay and that the employees would be treated as if they had been at work during the week prior to the holiday.

Both *Lott* and *Hanning* represent at least slightly distinguishable situations from that presented in the instant action. In *Hanning*, the company was obligated by agreement to pay plaintiffs had they not been at reserve training. In *Lott*, the "marking up" of employees was at issue and not actual presence on the job. In the instant action, we are not concerned with holiday pay or "marking up" for overtime. Rather, we are concerned directly with the presence of the employee on the job, and in effect, the degree to which the employer must manipulate his work schedule to allow for the presence of his guardsmen-employees on the job. Thus it is clear that the distinctions are without difference so far as the basic issue in this case is concerned.

Normally, employees at the defendant's refinery work a forty hour week. Regardless of the particular days of the week or shifts which an employee works, employees can be sure that they will be scheduled for a

full forty hours. Moreover, employees such as plaintiff can expect to work various days of the week depending on the work schedule as outlined above. In light of *Lott's* holding that "marking up" for overtime benefits constitutes an incident or advantage of employment, it would follow that being scheduled to work a full forty hour week constitutes an incident or advantage of employment. Thus, this Court has no trouble here holding that being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment for the plaintiff, and finding that the defendant is liable to plaintiff for those work dates when an accommodation should have been made.

The defendant attempts to analogize the statute here involved with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the EEOC Guidelines promulgated pursuant to the statute requiring only that employers make "reasonable accommodation" to the needs of employees to be absent for religious purposes. Defendant contends that the case law developed under these provisions only requires the employer's practices to be neutral, and equally applicable to all employees.

This analogy fails, because the statute here in question forbids denying those in military service incidents or advantages of employment because of their obligations of service. This does not mandate that all employees be treated neutrally or equally. It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern

to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be treated no differently than those who do not accept this obligation.

Nor is the Court persuaded by the argument that since the statute has not been construed to require the employer to pay wages to employees during their absence for extended periods of military service, such as the annual two week reserve training period, it should not be required to pay for the one or two day absences its employment scheduling practices forced upon the plaintiff. The difference between the two situations is not merely quantitative, but is qualitative.

Much argument is devoted to the complexities and burdens that might arise if the defendant were required to alter its scheduling practice to avoid the losses those practices have inflicted upon the plaintiff. Basically, this is purely a money issue, which would be difficult, if not impossible, for the Court to determine, but very simple for the defendant to resolve. If it would cost the defendant more to change its scheduling practices than it would to pay the plaintiff for the time he annually loses because of these practices, the defendant can choose the less expensive alternative. Neither individuals nor corporations can expect to live in a free nation without making some cash payments for the privilege.

THEREFORE, for the reasons stated, good cause appearing therefor, it is

ORDERED that the cross-motion of plaintiff for summary judgment be, and it hereby is, sustained; and it is

FURTHER ORDERED that the motion of defendant for summary judgment be, and it hereby is, overruled; and it is

FURTHER ORDERED that the clerk enter judgment in favor of plaintiff against the defendant in the sum of One Thousand Eighty-Six Dollars and Seventy-Two Cents ($1,086.72) for wages lost as a result of his serving his military obligation.

It is so ordered.

/s/ DON J. YOUNG
United States District Judge

Toledo, Ohio.
February 21, 1978.

APPENDIX E

# In the Supreme Court of the United States

No. A-4

ROGER D. MONROE,

PETITIONER,

*v.*

STANDARD OIL COMPANY

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 28, 1980.

/s/ POTTER STEWART
Associate Justice of
The Supreme Court of the United States

Dated this 8th day of July, 1980.

No. 80-298

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

ROGER D. MONROE, PETITIONER

*v.*

THE STANDARD OIL COMPANY

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

---

PETITION FOR CERTIORARI FILED AUGUST 28, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

# In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-298

---

ROGER D. MONROE, PETITIONER

*v.*

THE STANDARD OIL COMPANY

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

---

No. C76-71

ROGER D. MONROE

*v.*

THE STANDARD OIL COMPANY

---

**RELEVANT DOCKET ENTRIES**

---

| DATE | PROCEEDING |
|---|---|
| 2-25-76 | Complaint fld.<br>Summons issued. |
| 3-10-76 | 1 Summons returned SERVED 2-26-76 The Standard Oil Co. thru Phil Cancil, filed. Marshal fees $19.00. |
| 3-12-76 | Deft. answer, filed. Copies mailed. |
| 7-30-76 | Pltf's interrogatories to deft., filed. Copies mailed. |
| 7-30-76 | Pltf's request for admissions by deft., filed. Copies mailed. |
| 8-30-76 | Deft. answers to request for admissions, filed. Copies mailed. |
| 9-2-76 | Defs. req. for admissions by pltf., fld. c.m. |
| 9-9-76 | Deft. Standard Oil Co., answers to interrogatories, filed. Copies mailed. |
| 10-13-76 | Pltf's supplemental request for admissions by deft., filed. Copies mailed |
| 11-4-76 | Deft's response to pltf's supplemental request for admissions, filed copies mailed. |
| 10-13-76 | Pltf's supplemental interrogatories to deft., filed. Copies mailed. |

| DATE | PROCEEDING |
|---|---|
| 11-4-76 | Deft's answers to pltf's supplemental interrogatories, filed. Copies mailed. |
| 3-29-77 | Not. p.t. Tuesday, May 3, 1977 at 1:30 p.m. mld. |
| 10-13-76 | Pltf's response to deft's request for admissions by pltf., filed. Copies mailed. |
| 4-20-77 | Deft's. motion for summary judgment filed. Mld. |
| 4-25-77 | Not. vacating p.t. set for Tuesd., May 3, at 1:30 p.m. mld. |
| 4-26-77 | Approved Stip. to hold in abeyance Court's ruling on defts motion for summary judgment and to pass pretrial conference of May 3, 1977, filed. DJY Copies mailed. |
| 6-21-77 | Stip. of facts, filed. |
| 6-21-77 | Pltf's cross-motion for summary judgment, filed. Attached memo in support. Copies mailed. |
| 7-5-77 | Pltf's motion for leave to file supplemental memo. of law, filed. Copies mailed. |
| 7-6-77 | Stip. and ordered that deft. Standard Oil Co. has to July 15, 1977 to reply to pltf's Memo. of law in support of cross-motion for summary judgment, filed. DJY Copies served. |
| 7-15-77 | Deft's reply brief to pltf's memo. of law in support of cross-motion for summary judgment, filed. Copies mailed. |
| 7-18-77 | Pltf's motion for leave to file supplemental matter in support of motion for summary judgment, filed. Copies mailed. |
| 8-29-77 | Approved pltf's motion for leave to file supplemental matter, filed. DJY Copies mailed. |
| 8-29-77 | Approved pltf's motion for leave to file supplemental memo. of law, filed. DJY Copies mailed. |
| 8-29-77 | Pltf's supplemental memo. of law in support of cross-motion for summary judgment, filed. |
| 9-15-77 | Not. p.t. Mon. Oct. 17, 1977 at 2:30 p.m. mld. |
| 9-27-77 | Pltf. motion to vacate pretrial, filed. |
| 10-5-77 | ORDERED that p.t. scheduled for 10-17-77 at 2:30 is hereby cancelled, fld. DJY, J. c.m. |
| 2-22-78 | Opinion and ORDER: . . . that cross-motion of pltf. for summary judgment is hereby sustained; and F.O. mo. of def. for summary judgment is hereby OVERruled; and F.O. Clk. to enter judgment in favor of pltf. |

| DATE | PROCEEDING |
|---|---|
| | against def. in the sum of $1,086.72 for wages lost as result of serving military obligation, fld. DJY, J. c.m./serv. |
| 2-22-78 | Judgment entered in favor of pltf. against def. in the sum of $1,086.72, fld. c.m. |
| 3-22-78 | Deft. Standard Oil Co. Notice of Appeal, filed. Copy mailed. (3-27-78 copy of Notice of Appeal with copy of docket entries mailed to U.S. Sixth Circuit Court of Appeals) |
| 4-25-78 | Certified record sent in on appeal to U.S. Sixth Circuit Court of Appeals, Cincinnati. |
| 5-17-78 | Acknowledged receipt US Ct. of Appeals fld. 5-15-78, their #78-3233, fld. |
| 5-6-80 | OPINION of the Sixth Circuit, filed 1-24-80 judgment of District Court reversed and remanded with instructions to dismiss the complaint. |
| 5-6-80 | JUDGMENT of Sixth Circuit, filed 1-24-80. Issued as Mandate 5-1-80; Costs: None. |
| 5-6-80 | CERTIFIED RECORD on appeal returned from Sixth Circuit, filed and acknowledged receipt. |
| 5-7-80 | ORDER filed. DJY. Clerk to refund appeal bond in the sum of $250.00 from the Registry. Notice Waived. |
| 5-20-80 | ORDER of the Court, filed. DJY Copies to AUSA and Garland. Ordered that the complaint is dismissed. |

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 78-3233

ROGER D. MONROE

*v.*

THE STANDARD OIL COMPANY

---

**RELEVANT DOCKET ENTRIES**

| DATE | PROCEEDING |
|---|---|
| 5-15-78 | *Certified record* (1 vol. pleadings), filed; and cause docketed |
| 10-5-79 | Cause argued by Paul S. McAuliffe for appellant, by William H. Berger for appellee and case submitted to the Court (Before: Celebrezze, Engel and Peck, JJ.) |
| 1-24-80 | Judgment of the District Court reversed and cause remanded with instructions to dismiss the complaint (Celebrezze, Engel, and Peck, JJ.) |
| 1-24-80 | Opinion by Peck, J. |
| 3-7-80 | Petition of appellee for rehearing & suggestion for rehearing en banc (m-3/6) [Distributed to the Court]. |
| 4-15-80 | Order denying petition for rehearing (Celebreeze, Engel and Peck, JJ.) |

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76–71
Judge Don J. Young

ROGER D. MONROE, PLAINTIFF,

*v.*

THE STANDARD OIL COMPANY, DEFENDANT.

---

**COMPLAINT**

I

This is an action under Section 404(a) of the Vietnam Era Veteran's Readjustment Assistance Act of 1974, (38 U.S.C. §2022), hereinafter called the Act, and jurisdiction is vested in this court pursuant thereto.

II

Defendant is a corporation, with a place of business located in Lima, Ohio, within the jurisdiction of this Court.

III

Plaintiff Roger D. Monroe was first employed by defendant as a full-time employee in June, 1974 at Lima, Ohio, in a position other than temporary within the meaning of the Act.

IV

Plaintiff was absent from said position to perform military reserve duty and training on May 10 and 11, 1975.

V

Defendant has failed and refused to offer plaintiff opportunity to perform work to the extent he would have en-

joyed had he not been absent for military reserve duty and training on the aforesaid dates.

VI

Defendant has violated 38 U.S.C. §2021(b)(3) by denying plaintiff an advantage of employment because of his obligation as a member of a reserve component of the Armed Forces of the United States. Defendant has also violated 38 U.S.C. §2024(d) by refusing to permit plaintiff, upon release from periods of such duty and training, to return to his position with such pay as he would have had if he had not been absent for such purposes.

WHEREFORE, plaintiff prays that defendant be required to grant him the full advantage and pay to which he is entitled under the Act; that he be granted, retroactively, such opportunities for work as have been heretofore denied him by reason of defendant's unlawful actions; that he be compensated for loss of wages suffered by reason of defendant's unlawful actions; and for such other further relief as the Court may deem appropriate.

FREDERICK M. COLEMAN
*United States Attorney*

By _____
PATRICK J. FOLEY
*Assistant United States Attorney*

Of Counsel:

WILLIAM J. KILBERG
*Solicitor of Labor*

HERMAN GRANT
*Regional Solicitor*

W. S. KLOEPFER
*Associate Regional Solicitor*

GREGORY B. TAYLOR
*Attorney*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 76-71

Judge Don J. Young

ROGER D. MONROE, PLAINTIFF

*v.*

THE STANDARD OIL COMPANY, DEFENDANT

---

**ANSWER**

1. Defendant admits the allegations contained in paragraphs I, II, III, and IV of the Complaint.

2. Defendant denies the allegations contained in paragraph V of the Complaint.

3. Defendant denies the allegations contained in paragraph VI of the Complaint.

/s/ _____
JOHN GARLAND
*Attorney for Defendant*
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answer was served on Patrick J. Foley, Assistant U.S. Attorney, 307 U.S. Courthouse, Toledo, Ohio 43624 by placing a copy in the U.S. mail this 11 day of March, 1976.

/s/ _____
JOHN GARLAND
*Attorney for Defendant*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76-71

Judge Young

ROGER D. MONROE, PLAINTIFF

*v.*

THE STANDARD OIL COMPANY, DEFENDANT

---

**ANSWERS TO REQUEST FOR ADMISSIONS**

Defendant, The Standard Oil Company, by its attorney, John Garland, answers the request for admissions served upon The Standard Oil Company by plaintiff on August 2, 1976 as follows:

*Request No. 1.* At all times pertinent hereto, since June, 1974, plaintiff Roger D. Monroe has been employed at defendant's refinery located at Lima, Ohio.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 2.* At all times pertinent hereto, plaintiff has been employed as a nonregular breaker, holding the entry level plus one grade position.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 3.* A nonregular breaker's duties include, in addition to labor and maintenance work, relieving the operators for the various operation units, as well as the regular breakers, when required to do so.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 4.* Plaintiff is trained to relieve the LPG operator when required to do so.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 5.* Plaintiff has customarily worked a 40-hour week, except for weeks during which he has been absent to perform military reserve duties.

Answer: Defendant admits that plaintiff customarily worked a 40-hour week except for weeks during which he had been absent to perform military reserve duties and except for weeks when he was absent for other reasons such as vacations, sick time, personal time off and time off for military leave and except for those weeks in which plaintiff worked overtime.

*Request No. 6.* At all times pertinent hereto, employment at the Lima refinery has been governed by a collective bargaining agreement, effective January 8, 1975 between defendant and the Oil, Chemical, and Atomic Workers International Union.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 7.* Article V, paragraph 23 of the agreement provides as follows:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 8.* Defendant's Lima refinery normally remains in operation 24 hours per day, 7 days per week, including three daily work shifts.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 9.* On May 10 and 11, 1975, plaintiff was absent from work to attend military reserve training.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 10.* As a result of said absence plaintiff missed 16 hours of scheduled working time, for which he was not compensated.

Answer: Defendant admits the truth of the matters set forth in this request. Defendant points out that under the provisions of Article V, paragraph 23 of the Collective Bargaining Agreement effective August 8, 1975 between defendant and the Oil, Chemical, and Atomic Workers International Union, plaintiff could have reached agreement with another employee so as not to have lost any work time. Plaintiff was apparently unable to reach such an agreement.

*Request No. 11.* Defendant took no steps to provide plaintiff with 16 substituted working hours, to make up for his lost working time on May 10 and 11, 1975, other than what is provided by Article V, paragraph 23 of the Collective Bargaining Agreement.

Answer: Defendant admits the truth of the matters set forth in this request.

*Request No. 12.* No employees of defendant voluntarily consented to exchange shifts with plaintiff during the week of May 10 and 11, 1975.

Answer: Defendant admits the truth of the matters set forth in this request.

/s/ _____

JOHN GARLAND,
*Attorney for Defendant,*
The Standard Oil Company
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answers to Request for Admissions was mailed this 26 day of August,

1976 to Patrick J. Foley, Assistant United States Attorney, 307 U.S. Courthouse, Toledo, Ohio 43624 by regular U.S. mail.

/s/ _____
JOHN GARLAND,
*Attorney for Defendant*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76-71
Judge Young

ROGER D. MONROE, PLAINTIFF

*v.*

THE STANDARD OIL COMPANY, DEFENDANT

---

**ANSWERS TO INTERROGATORIES**

Defendant, The Standard Oil Company, by D. E. Eschner, General Superintendent Administration of the Lima Refinery, answers the interrogatories served on it by plaintiff on August 2, 1976 as follows:

Interrogatory No. 1: If defendant denies, in whole or in part, Requests for Admission Nos. 2, , or 4, please describe plaintiff's position and duties of that position.

Answer: Not relevant since defendant answered request for admission nos. 2 and 4.

Interrogatory No. 2: If defendant denies, in whole in part, Request for Admission No. 5, please state plaintiff's normal work week and/or employment history in terms of weekly hours worked.

Answer: Defendant admits that plaintiff customarily worked a 40-hour week except for weeks during which he had been absent to perform military reserve duties and except for weeks when he was absent for other reasons such as vacations, sick time, personal time off and time off for military leave and except for those weeks in which plaintiff worked overtime.

Interrogatory No. 3: If defendant denies, in whole or in part, Request for Admission Nos. 11 or 12, please state in detail the steps taken by defendant or its employees to accommodate plaintiff's absence from work on March 10 and 11, 1975.

Answer: Not relevant since defendant answered request for admission nos. 11 and 12.

Interrogatory No. 4: State the total work force at the Lima refinery during 1975 and 1976.

Answer: 1975–571
1976–574

Interrogatory No. 5: State the total number of employees at the Lima refinery classified as nonregular breaker during 1975 and 1976.

Answer: 1975–24
1976–23 as of August 23, 1976

Interrogatory No. 6: State the total number of employees at the Lima refinery classified as regular breaker during 1975 and 1976.

Answer: 1975–10
1976–10 as of August 23, 1976

Interrogatory No. 7: State the total number, and names, of nonregular breaker employees at the Lima refinery during 1975 and 1976 who are, or were, trained to relieve the LPG operator.

Answer: 9—A. J. Burden
—S. P. Washington
—R. D. Monroe
—D. M. Gilbert
—G. P. Longbrake
—W. J. Harrod
—H. Owens
—H. L. Huston
—C. H. Johnson

D.E. Eschner, being duly sworn, deposes and says that he resides at 3460 Greens Rd. Lima Ohio; that he is the General Superintendent Administration at the Lima Refinery of The Standard Oil Company, Defendant; and that he has read the foregoing Answers to Interrogatories and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated

to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ _____
D. E. ESCHNER

STATE OF OHIO
SS:
COUNTY OF ALLEN

Signed and sworn to before me this 7 day of September, 1976.

/s/ _____
JAMES P. DILLER,

*Notary Public*
Notary public
In and for Allen County, Ohio
My Commission Expires Sept. 5, 1980

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answers to Interrogatories was mailed this 8th day of September, 1976 to Patrick J. Foley, Assistant United States Attorney, 307 U.S. Courthouse, Toledo, Ohio 43624 by regular U.S. mail.

/s/ _____
JOHN GARLAND,
*Attorney for Defendant*
The Standard Oil Company
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76-71

Judge Young

ROGER D. MONROE, PLAINTIFF

*vs.*

THE STANDARD OIL COMPANY, DEFENDANT

---

**DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL REQUEST FOR ADMISSIONS**

1. During 1975 and 1976, up to the present date, plaintiff was absent from his assigned working shift on the following dates to attend military reserve training and was unable to arrange for an exchange of shifts with other employees:

1975: May 10, 11
June 14, 15
September 7
October 4, 5
November 7
December 7

1976: January 9, 10, 11, 17, 18, 23, 24 & 25
February 7, 8
March 6
June 6
July 17, 18

RESPONSE: Denied.

2. As a result of his absence on the dates set forth in Request No. 1, plaintiff lost a total of approximately 184 hours of work, for which he was not compensated.

RESPONSE: Denied.

3. When non-regular breaker employees are absent from their assigned shifts, for reasons such as illness or family emergencies, it is the practice to assign extra board employees to fill in for them.

RESPONSE: Admitted.

4. During 1975 and 1976, there were occasions when extra board employees were assigned to shifts normally performed by non-regular breaker employees and/or LPG operators.

RESPONSE: Admitted.

/s/ _____

JOHN GARLAND,
*Attorney for Defendant*
The Standard Oil Company
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing response was sent to Patrick J. Foley, Assistant United States Attorney, 307 U.S. Courthouse, Toledo, Ohio 43624, by regular U.S. mail, this 2nd day of November, 1976.

/s/ _____

JOHN GARLAND,
*Attorney for Defendant*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76-71

Judge Young

ROGER D. MONROE, PLAINTIFF

*v.*

THE STANDARD OIL COMPANY, DEFENDANT

---

**DEFENDANT'S ANSWERS TO PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES**

Defendant, The Standard Oil Company, by D. E. Eschner, General Superintendent Administration of the Lima Refinery, answers Plaintiff's supplemental interrogatories as follows:

*No. 1.* If Defendant denies, in whole or in part, Request for Admission No. 1, please list the correct dates of such absences.

*ANSWER:* 1975: May 10, 11
June 14, 15
August 1
September 6
October 3, 4
November 7
December 7

1976: January 9, 10, 11, 17, 18, 23, 24 and 25
February 7, 8
March 6
June 6
July 17, 18

*No. 2.* If Defendant denies, in whole or in part, Request for Admission No. 2, please state the correct total of working hours lost by Plaintiff.

*ANSWER:* 192 hours of work

*No. 3.* If Defendant denies, in whole or in part, Request for Admission No. 3, please state in detail the procedures followed when non-regular breaker shift employees are absent by reason of illness or other emergencies.

*ANSWER:* Irrelevant since Defendant does not deny in whole or in part Request for Admission No. 3 except Defendant does point out that time and one-half had to be paid to the employee so assigned upon different occasions.

*No. 4.* If Defendant denies Request for Admission No. 4 or 5, please explain in detail the functions performed by extra board employees, the procedure by which they are assigned to work, the situations under which they are called, and the types of work which they are qualified to do.

*ANSWER:* Irrelevant since Defendant does not deny in whole or in part Request for Admission No. 4 except Defendant does point out that time and one-half had to be paid to the employee so assigned upon different occasions.

D. E. Eschner, being duly sworn deposes and says that he resides at 3460 Greens Road, Lima, Ohio; that he is the General Superintendent Administration at the Lima Refinery of The Standard Oil Company, Defendant; and that he has read the foregoing Answers to Interrogatories and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ _____
D. E. ESCHNER

STATE OF OHIO

SS:

COUNTY OF ALLEN

Signed and sworn to before me this 28 day of October, 1976.

JAMES P. DILLER
*Notary Public*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answers to Interrogatories was mailed this 2 day of November, 1976 to Patrick J. Foley, Assistant United States Attorney, 307 U.S. Courthouse, Toledo, Ohio 43624 by regular U.S mail.

/s/ _____

JOHN GARLAND,
*Attorney for Defendant*
The Standard Oil Company
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C 76-71
Judge Young

ROGER D. MONROE, PLAINTIFF,

*v.*

THE STANDARD OIL COMPANY, DEFENDANT.

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**PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS BY PLAINTIFF**

Plaintiff, by his attorney, gives the following response to Defendant's Request for Admissions served upon the plaintiff on September 2, 1976:

1. At all times pertinent hereto, since June, 1974, plaintiff Roger D. Monroe has been employed at defendant's refinery located at Lima, Ohio.

Admitted.

2. At all times pertinent hereto, plaintiff has been employed as a nonregular breaker, holding the entry level plus one grade position.

Admitted.

3. A nonregular breaker's duties include, in addition to labor and maintenance work, relieving the operators for the various operation units, as well as the regular breakers, when required to do so.

Admitted

4. Plaintiff is trained to relieve only the LPG operator when required to do so.

Admitted

5. Except for weeks when plaintiff was absent from work for reasons such as vacation, sick time, personal time off and time off for military leave and except for those

weeks in which plaintiff worked overtime, plaintiff has customarily worked a 40-hour week.

Admitted

6. At all times pertinent hereto, employment at the Lima refinery has been governed by a collective bargaining agreement, effective January 8, 1975, between defendant and the Oil, Chemical, and Atomic Workers International Union.

Admitted

7. Article V, paragraph 23 of the agreement provided as follows:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

Admitted

8. Plaintiff has been treated the same as all other employees of defendant who were classified as nonregular breakers in regard to rate of pay and other benefits under the collective bargaining agreement effective January 8, 1975, between defendant and the Oil, Chemical, and Atomic Workers International Union.

Admitted

9. For the week beginning May 4, 1975, and for the week beginning May 11, 1975, defendant scheduled plaintiff for the same number of working hours that defendant scheduled other nonregular breakers who were qualified to relieve LPG operators.

Admitted

10. Plaintiff had the right, the same as other employees of defendant, by mutual consent with another employee and with the consent of their foreman, to change shifts (hours, days or both), provided such change did not require the payment of overtime or premium pay.

Admitted

11. On several different occasions when plaintiff was scheduled to work hours which he desired off to attend military reserve training he changed shifts (hours, days or both) with other employees so he could attend military reserve training and still work a 40 hour week.

Plaintiff admits that on four (4) different occasions in 1975 and 1976 when plaintiff was scheduled to work hours when he was required to attend military reserve training he changed shifts (hours, days or both) with other employees so that he could attend military reserve training and still work a 40 hour week.

However, plaintiff states that he missed scheduled shifts on twenty-three (days) during 1975 and 1976 by reason of military reserve training when he was unable to exchange shifts with other employees, and consequently lost a total of 184 working hours.

12. Plaintiff was scheduled for and did attend military reserve training on May 10 and May 11, 1975.

Admitted.

13. Since plaintiff was scheduled to attend military reserve training on May 10 and May 11, 1975, he attempted to have other employees of defendant voluntarily agree to exchange shifts (hours, days or both) with plaintiff so he would be able to work a full 40 hours during the weeks beginning May 4 and May 11, 1975.

Admitted.

14. Plaintiff was paid at the rate of $5.66 per hour for the hours he worked during the weeks beginning May 4 and May 11, 1975, and would have been paid at the same rate had he worked on May 10 and May 11, 1975.

Admitted.

15. Plaintiff was unsuccessful in his attempts to change shifts (days, hours or both) for the weeks beginning May 4 and May 11, 1975.

Admitted.

FREDERICK M. COLEMAN
*United States Attorney*

By _____
PATRICK J. FOLEY
*Assistant United States Attorney*
307 U.S. Courthouse
Toledo, Ohio 43624
Phone: (419) 259-6476

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C76-71
Judge Don J. Young

ROGER D. MONROE, PLAINTIFF,

*v.*

THE STANDARD OIL COMPANY, DEFENDANT.

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## STIPULATION OF FACTS

The parties hereto by and through their respective counsels, hereby stipulate to the following facts and it is understood and agreed by and between the parties that this stipulation shall be binding upon any subsequent motions, pleadings, or actions which may be initiated by either party. The following facts are true:

1. This is an action under Section 404(a) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, (38 U.S.C. §2022), and jurisdiction is vested in this Court pursuant thereto.

2. Defendant, The Standard Oil Company, is a corporation, with a place of business located in Lima, Ohio, within the jurisdiction of this Court.

3. Plaintiff, Roger D. Monroe, was first employed by defendant as a full-time employee in June of 1974, at Lima, Ohio, in a position other than temporary within the meaning of the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

4. At all times pertinent hereto, since June, 1974, plaintiff Roger D. Monroe has been employed at defendant's refinery located at Lima, Ohio.

5. Except for weeks when plaintiff was absent from work for reasons such as vacation, sicktime, personal time off, and time off for military leave and except for those

weeks in which plaintiff worked overtime, plaintiff has customarily worked a 40-hour week.

6. At all times pertinent hereto, employment at the Lima refinery has been governed by a collective bargaining agreement, effective January 8, 1975, between defendant and the Oil, Chemical, and Atomic Workers International Union.

7. Article V, paragraph 23 of the agreement provided as follows:

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

8. Plaintiff has been employed in the following classifications during the periods indicated:

September, 1974 to September, 1976—LPG Operator

September, 1976 to November, 1976—OM & S Breaker

November, 1976, to the Present—OM & S Operator.

9. Plaintiff has been treated the same as all other employees of defendant in his classification in regard to rate of pay and other benefits under the collective bargaining agreement effective January 8, 1975, between defendant and the Oil, Chemical, and Atomic Workers International Union.

10. During all the weeks in question herein, defendant scheduled plaintiff for the same number of working hours that defendant scheduled other nonregular breakers.

11. Plaintiff had the right, the same as other employees of defendant, by mutual consent with another employee and with the consent of their foreman, to change shifts (hours, days or both), provided such change did not require the payment of overtime or premium pay.

12. On four (4) different occasions in 1975 and 1976 when plaintiff was scheduled to work hours when he was re-

quired to attend military reserve training he changed shifts (hours, days or both) with other employees so that he could attend military reserve training and still work a 40-hour week.

13. Plaintiff was scheduled for and did attend military reserve training on the following dates, and was for that reason absent from his assigned working shift:

1975: May 10, 11
June 14, 15
August 1
September 6
October 3, 4
November 7
December 7

1976: January 9, 10, 11, 17, 18, 23 24 & 25
February 7, 8
March 6
June 6
July 17, 18

14. On the above dates, plaintiff was unable to arrange for an exchange of shifts with other employees, so as to be able to work a full 40 hours during such weeks.

15. As a result of his absence on the dates set forth in paragraph 13, plaintiff lost a total of 192 hours of work, for which he was not compensated.

16. Plaintiff was paid at the rate of $5.66 per hour for the hours he worked during the weeks beginning May 4 and May 11, 1975, and would have been paid at the same rate had he worked on May 10, and 11, 1975.

17. Defendant's Lima refinery normally remains in operation 24 hours per day, 7 days per week, including three daily work shifts.

18. As a result of plaintiff being absent from work on May 10 and 11, 1975, for military training, he missed 16 hours of scheduled working time, for which he was not compensated.

19. Defendant took no steps to provide plaintiff with substituted hours, to make up for plaintiff's lost working time on the dates listed in paragraph 13, other than what is provided by Article V, paragraph 23 of the Collective Bargaining Agreement.

20. When nonregular, breaker employees are absent from their assigned shifts, for reasons such as illness or family emergencies, it is the practice to assign extra board employees to fill in for them.

21. During 1975 and 1976, there were occasions when extra board employees were assigned to shifts normally performed by nonregular breaker employees and for LPG operators.

22. Plaintiff is required by his Reserve unit to attend training assemblies with this unit on the third weekend of each month, plus two weeks annual training the last two weeks of August.

23. Exhibit A is a true representation of the Refinery Pumping Department schedule during 1977, showing three daily shifts, with employees being designated by letter symbols. Plaintiff is designated by the symbol "O", and his assignments are circled, with weekend days being underlined.

THE STANDARD OIL COMPANY

/s/ By _____
JOHN GARLAND
*Attorney for Defendant*
The Standard Oil Company
1725 Midland Building
Cleveland, Ohio 44115
(216) 575-4567

Date June 2, 1977

ROGER D. MONROE
WILLIAM D. BEYER
*United States Attorney*

BY _____
PATRICK J. FOLEY
*Assistant United States Attorney*
307 U.S. Courthouse
Toledo, Ohio 43624
(419) 259-6376

Date June 20, 1977

REFINERY PUMPING DEPARTMENT SCHEDULE Carbon A

| | 12-20-76 | | | | | | | 12-27-76 | | | | | | | 1-3-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| | | | | | ★ | ★ | | | | | | | * | | | | | | | | |
| Per | C | C | C | D | D | D | D | D | E | A | A | A | A | A | B | B | B | B | B | C | C |
| #2 | H | H | H | H | E | I | I | I | I | F | F | F | F | F | G | G | G | G | G | G | H |
| #3 | L | L | L | L | L | E | M | M | M | M | J | J | J | J | J | K | K | K | K | K | K |
| #1 | P | P | Q | Q | Q | Q | E | E | N | N | N | N | N | O | O | O | O | O | P | P | P |
| #4 | R | S | S | S | S | S | Q | T | T | T | T | T | U | U | U | U | R | R | R | R | |
| Per | B | B | B | B | B | C | C | C | C | D | D | D | D | D | E | A | A | A | A | A | A |
| #3 | F | G | G | G | G | G | H | H | H | H | E | I | I | I | I | F | F | F | F | F | |
| #1 | J | J | K | K | K | K | K | L | L | L | L | L | E | M | M | M | M | M | J | J | J |
| #2 | O | O | O | O | P | P | P | P | P | Q | Q | Q | Q | E | E | N | N | N | N | N | O |
| #4 | U | U | U | R | R | R | R | R | S | S | S | S | S | Q | T | T | T | T | T | U | U |
| Per | D | E | A | A | A | A | A | B | B | B | B | B | C | C | C | C | D | D | D | D | |
| #1 | I | I | I | F | F | F | F | F | G | G | G | G | G | H | H | H | H | E | I | I | |
| #2 | M | M | M | M | J | J | J | J | J | K | K | K | K | K | L | L | L | L | L | E | M |
| #3 | E | N | N | N | N | N | O | O | O | O | P | P | P | P | P | Q | Q | Q | Q | Q | E |
| #4 | T | T | T | T | T | U | U | U | U | U | R | R | R | R | R | S | S | S | S | S | Q |

| | 1-10-77 | | | | | | | 1-17-77 | | | | | | | 1-24-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| Per | C | C | D | D | D | D | D | E | A | A | A | A | A | B | B | B | B | C | C | C | |
| #1 | F | F | F | E | I | I | I | I | I | H | H | H | H | H | G | G | G | G | F | F | |
| #2 | J | J | J | J | E | M | M | M | M | L | L | L | L | L | K | K | K | K | K | J | |
| #3 | N | N | N | N | N | E | E | Q | Q | Q | P | P | P | P | P | O | O | O | O | O | |
| #4 | S | R | R | R | R | R | Q | U | U | U | U | U | T | T | T | T | S | S | S | S | |
| Per | B | B | B | B | C | C | C | C | C | D | D | D | D | D | E | A | A | A | A | A | B |
| #2 | G | G | G | G | F | F | | F | F | E | I | I | I | | I | H | H | H | H | H | |
| #3 | L | K | K | K | K | K | J | J | J | J | E | M | M | | M | M | L | L | L | L | |
| #1 | P | P | O | O | O | O | O | N | N | N | N | E | E | | Q | Q | Q | P | P | P | |
| #4 | T | T | T | S | S | S | S | S | R | R | R | R | R | Q | U | U | U | U | U | T | |
| Per | D | E | A | A | A | A | A | B | B | B | B | C | C | C | C | D | D | D | D | D | |
| #3 | I | I | H | H | H | H | H | G | G | G | G | F | F | | F | E | I | I | I | | |
| #1 | M | M | M | L | L | L | L | L | K | K | K | K | K | J | J | J | J | E | M | M | |
| #2 | Q | Q | Q | Q | P | P | P | P | P | O | O | O | O | O | N | N | N | N | E | E | |
| #4 | U | U | U | U | U | T | T | T | T | S | S | S | S | S | S | R | R | R | R | Q | |

| | 1-31-77 | | | | | | | 2-7-77 | | | | | | | 2-14-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| Per | C | D | D | D | D | D | E | A | A | A | A | A | B | B | B | B | C | C | C | C | |
| #3 | F | F | E | I | I | I | I | I | H | H | H | H | H | G | G | G | G | F | F | | |
| #1 | J | J | J | E | M | M | M | M | L | L | L | L | L | K | K | K | K | K | J | | |
| #2 | N | N | N | N | E | E | Q | Q | Q | P | P | P | P | P | O | O | O | O | O | | |
| #4 | R | R | R | R | R | Q | U | U | U | U | T | T | T | | T | T | S | S | S | | |
| Per | | B | B | B | C | C | C | C | D | D | D | D | D | E | A | A | A | A | A | B | B |
| #1 | | G | G | G | G | F | F | F | E | I | I | I | | | I | H | H | H | H | H | |
| #2 | | K | K | K | K | K | J | J | J | J | E | M | M | | M | L | L | L | L | L | |
| #3 | | P | O | O | O | O | O | N | N | N | N | E | E | Q | Q | Q | P | P | P | P | |
| #4 | | T | T | S | S | S | S | S | R | R | R | R | R | Q | U | U | U | U | T | T | |
| Per | | A | A | A | A | A | B | B | B | C | C | C | C | | C | D | D | D | D | D | E |
| #2 | | I | H | H | H | H | H | G | G | G | G | F | F | | F | E | I | I | I | | |
| #3 | | M | M | L | L | L | L | L | K | K | K | K | K | J | J | J | J | E | M | M | |
| #1 | | Q | Q | Q | P | P | P | P | P | O | O | O | O | O | N | N | N | N | E | E | |
| #4 | | U | U | U | T | T | T | T | S | S | S | S | S | | R | R | R | R | R | Q | |

(27)

A- E- I- M- Q- U-
B- F- J- N- R- Ex Brd:
C- G- K- O- MONROE S-
D- H- L- P- T-

Calendar Holiday

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## REFINERY PUMPING DEPARTMENT SCHEDULE

| Area | Hd. Pmpr | 2-21-77 M T W T F S S | 2-28-77 M T W T F S S | 3-7-77 M T W T F S S | 3-14-77 M T W T F S S | 3-21-77 M T W T F S S | 3-28-77 M T W T F S S | 4-4-77 M T W T F S S | 4-11-77 M T W T F S S | 4-18-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|---|
| | | ⊄ | | | | | | * | | |
| | | D D D D D E A | A A A A B B B | B B C C C C C | D D D D E A A | A A A B B B B | B C C C C C D | D D D E A A A | A A B B B B B | C C C C C D D |
| A | #2 | F E I I I I I | H H H H H G G | G G G F F F F | #1 E I I I I I H | H H H H G G G | G G F F F F F | #3 I I I I I H H | H H H G G G G | G F F F F F E |
| r | #3 | J J E M M M M | M L L L L L K | K K K K J J J | #2 J E M M M M M | L L L L L K K | K K K J J J J | #1 E M M M M M L | L L L L K K K | K K J J J J J |
| e | #1 | N N N E E Q Q | Q Q P P P P P | 0 0 0 0 0 N N | #3 N N E E Q Q Q | Q P P P P P 0 | 0 0 0 0 N N N | #2 N E E Q Q Q Q | P P P P 0 0 | 0 0 0 N N N N |
| a | | | | | | | | | | |
| | #4 | R R R R Q U U | U U U T T T T | T S S S S S R | #4 R R R Q U U U | U U T T T T T | S S S S S R R | #4 R R Q U U U U | U T T T T T S | S S S S R R R |

| Area | Hd. Pmpr | 3-14-77 M T W T F S S | 3-21-77 M T W T F S S | 3-28-77 M T W T F S S | 4-4-77 M T W T F S S | 4-11-77 M T W T F S S | 4-18-77 M T W T F S S |
|---|---|---|---|---|---|---|---|
| | | B C C C C C D | D D D D E A A | A A A B B B B | C C C C C D D | D D D E A A A | A A B B B B B |
| A | #2 | G G F F F F F | E I I I I I H | H H H H G G G | #1 G F F F F F E | I I I I I H H | H H H G G G G |
| r | #3 | K K K J J J J | J E M M M M M | L L L L L K K | #2 K K J J J J J | E M M M M M L | L L L L K K K |
| e | #1 | 0 0 0 0 N N N | N N E E Q Q Q | Q P P P P P 0 | #3 0 0 0 N N N N | N E E Q Q Q Q | P P P P P 0 0 |
| a | | | | | | | |
| | #4 | S S S S S R R | R R R Q U U U | U U T T T T T | #4 S S S S R R R | R R Q U U U U | U T T T T T S |

| Area | Hd. Pmpr | 3-14-77 M T W T F S S | 3-21-77 M T W T F S S | 3-28-77 M T W T F S S | 4-4-77 M T W T F S S | 4-11-77 M T W T F S S | 4-18-77 M T W T F S S |
|---|---|---|---|---|---|---|---|
| | | A A A B B B B | B C C C C C D | D D D D E A A | A A B B B B B | C C C C C D D | D D D E A A A |
| A | #3 | H H H H G G G | G G F F F F F | E I I I I I H | #2 H H H G G G G | G F F F F F E | I I I I I H H |
| r | #1 | L L L L L K K | K K K J J J J | J E M M M M M | #3 L L L L K K K | K K J J J J J | E M M M M M L |
| e | #2 | Q P P P P P 0 | 0 0 0 0 N N N | N N E E Q Q Q | #1 P P P P P 0 0 | 0 0 0 N N N N | N E E Q Q Q Q |
| a | | | | | | | |
| | #4 | U U T T T T F | S S S S S R R | R R R Q U U U | #4 U T T T T T S | S S S S R R R | R R Q U U U U |

A- 2- C- 4-
E- F- G- H-
I- J- K- L-
M- N- O- P-
Q- R- S- T-
U-
Ex. Bd:

Holiday

(28)

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## REFINERY PUMPING DEPARTMENT SCHEDULE

| Hd Pmpr | 4-25-77 M T W T F S S | 5-2-77 M T W T F S S | 5-9-77 M T W T F S S | 5-16-77 M T W T F S S | 5-23-77 M T W T F S S | 5-30-77 M T W T F S S | 6-6-77 M T W T F S S | 6-13-77 M T W T F S S | 6-20-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Area A #2 | I I I I H H H | H H G G G G G | F F F F F E I | I I I H H H H | H G G G G G F | F F F F E I I | I I H H H H H | G G G G G F F | F F F E I I |
| Area #3 | M M M M M L L | L L L K K K K | K J J J J J E | M M M M L L L | L K K K K K J | J J J J E M M | M M M L L L L | L K K K K K J | J J J J E M M |
| Area #1 | E E Q Q Q Q P | P P P P 0 0 0 | 0 0 N N N N N | E Q Q Q Q P P | P P P 0 0 0 0 | 0 N N N N N E | Q Q Q Q P P P | P P 0 0 0 0 0 | N N N N N E E |
| #4 | R Q U U U U U | T T T T T S S | S S S R R R R | Q U U U U U T | T T T T S S S | S S R R R R R | U U U U U T T | T T T S S S S | S R R R R R Q |

| Hd. Pmpr | 4-25-77 M T W T F S S | 5-2-77 M T W T F S S | 5-9-77 M T W T F S S | 5-16-77 M T W T F S S | 5-23-77 M T W T F S S | 5-30-77 M T W T F S S | 6-6-77 M T W T F S S | 6-13-77 M T W T F S S | 6-20-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Area A #3 | F F F F F E I | I I I I H H H | H H G G G G G | F F F F E I I | I I I H H H H | H G G G G G F | F F F E I I I | I I H H H H H | G G G G G F F |
| Area #1 | K J J J J J E | M M M M M L L | L L L K K K K | J J J J E M M | M M M L L L L | L K K K K K J | J J J E M M M | M M M L L L L | L K K K K K J |
| Area #2 | 0 0 N N N N N | E E Q Q Q Q P | P P P P 0 0 0 | 0 N N N N N E | E Q Q Q Q P P | P P P 0 0 0 0 | N N N N N E E | Q Q Q Q P P P | P P 0 0 0 0 0 |
| #4 | S S S R R R R | R Q U U U U U | T T T T T S S | S S R R R R R | Q U U U U U T | T T T T S S S | S R R R R R Q | U U U U U T T | T T T S S S S |

| Hd. Pmpr | 4-25-77 M T W T F S S | 5-2-77 M T W T F S S | 5-9-77 M T W T F S S | 5-16-77 M T W T F S S | 5-23-77 M T W T F S S | 5-30-77 M T W T F S S | 6-6-77 M T W T F S S | 6-13-77 M T W T F S S | 6-20-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Area A #1 | H H G G G G G | F F F F F E I | I I I I H H H | H G G G G G F | F F F F E I I | I I I H H H H | H G G G G F F | G G G G G F F | F F F E I I I |
| Area #2 | L L L K K K K | K J J J J J E | M M M M M L L | L K K K K K J | J J J J E M M | M M M L L L L | L K K K K J J | J J J J E M M | M M M L L L L |
| Area #3 | P P P P 0 0 0 | 0 0 N N N N N | E E Q Q Q Q P | P P P 0 0 0 0 | 0 N N N N N E | E Q Q Q Q P P | P P 0 0 0 0 0 | N N N N N E E | Q Q Q Q P P P |
| #4 | T T T T T S S | S S S R R R R | R Q U U U U U | T T T T S S S | S S R R R R R | Q U U U U U T | T T T S S S S | S R R R R R Q | U U U U U T T |

A-
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Ex. Bd:

...ar Holiday

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## REFINERY PUMPING DEPARTMENT SCHEDULE

| Hd Pmpr | 6-27-77 M T W T F S S | 7-4-77 M T W T F S S | 7-11-77 M T W T F S S | 7-18-77 M T W T F S S | 7-25-77 M T W T F S S | 8-1-77 M T W T F S S | 8-8-77 M T W T F S S | 8-15-77 M T W T F S S | 8-22-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Area #1 | A A A A A B B | B B B C C C C | C D D D D D E | A A A A B B B | B B C C C C C | D D D D D E A | A A A B B B B | B C C C C C D | D D D D E A A |
| Area #2 | I H H H H H G | G G G G F F F | F F E I I I I | H H H H G G G | G G G F F F F | F E I I I I I | H H H H G G G | G G F F F F F | E I I I I I H |
| Area #3 | M M L L L L L | K K K K K J J | J J J E M M M | M L L L L L K | K K K K J J J | J J E M M M M | L L L L L K K | K K K J J J J | J E M M M M M |
| Area #4 | Q Q Q P P P P | P (O O O O O) N | N N N N E E Q | Q Q P P P P P | (O O O O O) N N | N N N E E Q Q | Q P P P P P (O | O O O O) N N N | N N E E Q Q Q |
| | U U U U T T T | T T S S S S S | R R R R R Q U | U U U T T T T | T S S S S S R | R R R R Q U U | U U T T T T T | S S S S S R R | R R R Q U U U |

| Hd Pmpr | 6-27-77 M T W T F S S | 7-4-77 M T W T F S S | 7-11-77 M T W T F S S | 7-18-77 M T W T F S S | 7-25-77 M T W T F S S | 8-1-77 M T W T F S S | 8-8-77 M T W T F S S | 8-15-77 M T W T F S S | 8-22-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Area #1 | B B B C C C C | C D D D D D E | A A A A A B B | B B C C C C C | D D D D D E A | A A A A B B B | B C C C C C D | D D D D E A A | A A A B B B B |
| Area #2 | G G G G F F F | F F E I I I I | I H H H H H G | G G G F F F F | F E I I I I I | H H H H H G G | G G F F F F F | E I I I I I H | H H H H G G G |
| Area #3 | K K K K K J J | J J J E M M M | M M L L L L L | K K K K J J J | J J E M M M M | M L L L L L K | K K K J J J J | J E M M M M M | L L L L L K K |
| Area #4 | P (O O O O O) N | N N N N E E Q | Q Q Q P P P P | P (O O O O O) N N | N N N E E Q Q | Q Q P P P P P | (O O O O) N N N | N N E E Q Q Q | Q P P P P P (O |
| | T T S S S S S | R R R R R Q U | U U U T T T T | T S S S S S R | R R R R Q U U | U U U T T T T | S S S S S R R | R R R Q U U U | U U T T T T T |

A- E- I- M- Q- U-
B- F- J- N- R- Ex. Hd:
C- G- K- O- S-
D- H- L- P- T-

Calendar Holiday

(30)

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## REFINERY PUMPING DEPARTMENT SCHEDULE

| | 8-29-77 | | | | | | | 9-5-77 | | | | | | | 9-12-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| Hd Pmpr. | A | A | B | B | B | B | B | C | C | C | C | C | D | D | D | D | E | A | A | A | A |
| Area A #2 | H | H | H | G | G | G | G | G | F | F | F | F | F | E | I | I | I | I | I | H | H |
| Area #3 | L | L | L | L | K | K | K | K | K | J | J | J | J | J | E | M | M | M | M | M | L |
| Area #1 | P | P | P | P | P | O | O | O | O | O | N | N | N | N | N | E | E | Q | Q | Q | Q |
| Area | U | T | T | T | T | T | S | S | S | S | S | R | R | R | R | R | Q | U | U | U | U |
| Hd Pmpr. | D | D | D | E | A | A | A | A | A | B | B | B | B | B | B | C | C | C | C | C | D | D |
| Area #3 | I | I | I | I | I | Q | H | H | H | H | G | G | G | G | G | F | F | F | F | F | F | E |
| Area #1 | E | M | M | M | M | M | L | L | L | L | K | K | K | K | K | J | J | J | J | J | J | J |
| Area #2 | N | E | E | Q | Q | Q | Q | P | P | P | P | P | O | O | O | O | O | N | N | N | N | N |
| Area #4 | R | R | Q | U | U | U | U | U | T | T | T | T | T | S | S | S | S | S | R | R | R | R |
| Hd Pmpr. | C | C | C | C | C | D | D | D | D | E | A | A | A | A | A | B | B | B | B | B | B | B |
| Area #1 | G | F | F | F | F | F | E | I | I | I | I | H | H | H | H | G | G | G | G | G | G | G |
| Area #2 | K | K | J | J | J | J | J | E | M | M | M | M | M | L | L | L | L | L | K | K | K | K |
| Area #3 | O | O | O | N | N | N | N | N | E | E | Q | Q | Q | Q | P | P | P | P | P | O | O | O |
| Area #4 | S | S | S | S | S | R | R | R | R | Q | U | U | U | U | U | T | T | T | T | T | T | S |

| | 9-19-77 | | | | | | | 9-26-77 | | | | | | | 10-3-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| Area #1 | H | H | G | G | G | G | G | F | F | F | F | F | E | I | I | I | I | H | H | H | H |
| Area #2 | L | L | L | K | K | K | K | K | J | J | J | J | J | E | M | M | M | M | M | L | L |
| Area #3 | P | P | P | P | O | O | O | O | O | N | N | N | N | N | E | E | Q | Q | Q | Q | P |
| Area #4 | T | T | T | T | T | S | S | S | S | R | R | R | R | R | R | Q | U | U | U | U | U |
| Area #2 | I | I | I | I | H | H | H | H | H | G | G | G | G | G | F | F | F | F | F | E | I |
| Area #3 | M | M | M | M | M | L | L | L | L | K | K | K | K | K | J | J | J | J | J | E | M |
| Area #1 | E | E | Q | Q | Q | Q | P | P | P | P | P | O | O | O | O | N | N | N | N | N | E |
| Area #4 | R | Q | U | U | U | U | U | T | T | T | T | T | S | S | S | S | R | R | R | R | R |
| Area #1 | C | C | C | C | C | D | D | D | D | E | A | A | A | A | A | B | B | B | B | B | B | C |
| Area #2 | F | F | F | F | F | E | I | I | I | I | H | H | H | H | H | G | G | G | G | G | G | F |
| Area #3 | K | K | J | J | J | J | J | E | M | M | M | M | M | L | L | L | L | K | K | K | K | K |
| Area #1 | O | O | O | N | N | N | N | N | E | E | Q | Q | Q | Q | P | P | P | P | O | O | O | O |
| Area #4 | S | S | S | S | R | R | R | R | R | Q | U | U | U | U | U | T | T | T | T | T | S | S |

| | 10-10-77 | | | | | | | 10-17-77 | | | | | | | 10-24-77 | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | M | T | W | T | F | S | S | M | T | W | T | F | S | S | M | T | W | T | F | S | S |
| Area #3 | B | B | B | B | B | C | C | C | C | C | D | D | D | D | D | E | A | A | A | A | A |
| Area #1 | H | G | G | G | G | G | F | F | F | F | F | E | I | I | I | I | H | H | H | H | H |
| Area #2 | L | L | K | K | K | K | K | J | J | J | J | J | E | M | M | M | M | L | L | L | L |
| Area #4 | P | P | P | O | O | O | O | O | N | N | N | N | N | E | E | Q | Q | Q | Q | P | P |
| Area #4 | T | T | T | T | S | S | S | S | S | R | R | R | R | R | Q | U | U | U | U | U | T |
| Area #3 | D | E | A | A | A | A | A | B | B | B | B | B | C | C | C | C | C | D | D | D | D |
| Area #1 | I | I | I | H | H | H | H | H | G | G | G | G | G | F | F | F | F | F | E | I | I |
| Area #2 | M | M | M | M | L | L | L | L | L | K | K | K | K | K | J | J | J | J | J | E | M |
| Area #4 | E | Q | Q | Q | Q | P | P | P | P | O | O | O | O | O | N | N | N | N | N | N | E |
| Area #4 | Q | U | U | U | U | U | T | T | T | T | S | S | S | S | S | R | R | R | R | R | R |
| Area #2 | C | C | C | D | D | D | D | D | E | A | A | A | A | A | B | B | B | B | B | C | C |
| Area #1 | F | F | F | F | F | E | I | I | I | H | H | H | H | H | G | G | G | G | G | F | F |
| Area #2 | J | J | J | J | J | E | M | M | M | M | L | L | L | L | K | K | K | K | K | K | K |
| Area #3 | O | O | N | N | N | N | E | E | Q | Q | Q | P | P | P | P | O | O | O | O | O | O |
| Area #4 | S | S | R | R | R | R | R | Q | U | U | U | U | U | T | T | T | T | S | S | S | S |

A- E- I- M- Q- U-
B- F- J- N- R- ExBrd:
C- G- K- O- S-
D- H- L- P- T-

Calendar Holiday

(31)

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## REFINERY PUMPING DEPARTMENT SCHEDULE

| Area | 10-31-77 M T W T F S S | 11-7-77 M T W T F S S | 11-14-77 M T W T F S S | 11-21-77 M T W T F S S | 11-28-77 M T W T F S S | 12-5-77 M T W T F S S | 12-12-77 M T W T F S S | 12-19-77 M T W T F S S | 12-26-77 M T W T F S S |
|---|---|---|---|---|---|---|---|---|---|
| Hd Pmpr | B B B B C C C | C C D D D D D | E A A A A A B | B B B C C C C | C D D D D D E | A A A A A B B | B B C C C C C | D D D D D E A | A A A A B B B |
| A #2 | G G G G G F F | F F F E I I I | I I H H H H H | #1 G G G G F F F | F F E I I I I | I H H H H H G | #3 G G G F F F F | F E I I I I I | H H H H H G G |
| r #3 | L K K K K K J | J J J J E M M | M M M L L L L | #2 K K K K K L L | J J J E M M M | M M L L L L L | #1 K K K K J J J | J J E M M M M | M L L L L L K |
| e #1 | P P (0 0 0 0 0) | N N N N N E E | Q Q Q Q P P P | #3 P (0 0 0 0 0) N | N N N N E E Q | Q Q Q P P P P | #2 (0 0 0 0 0) N N | N N N E E Q Q | Q Q P P P P P |
| a #4 | T T T S S S S | S R R R R R Q | U U U U U T T | #4 T T S S S S S | R R R R R Q U | U U U U T T T | #4 T S S S S S R | R R R R Q U U | U U U T T T T |
| Hd Pmpr | E A A A A A B | B B B B C C C | C C D D D D D | A A A A A B B | B B B C C C C | C D D D D D E | A A A A B B B | B B C C C C C | D D D D D E A |
| A #3 | I I H H H H H | G G G G G F F | F F F E I I I | #2 I H H H H H G | G G G G F F F | F F E I I I I | #1 H H H H H G G | G G G F F F F | F E I I I I I |
| r #1 | M M M L L L L | L K K K K K J | J J J J E M M | #3 M M L L L L L | K K K K K J J | J J J E M M M | #2 M L L L L L K | K K K K J J J | J J E M M M M |
| e #2 | Q Q Q Q P P P | P P (0 0 0 0 0) | N N N N N E E | #1 Q Q Q P P P P | P (0 0 0 0 0) N | N N N N E E Q | #3 Q Q P P P P P | (0 0 0 0 0) N N | N N N E E Q Q |
| a #4 | U U U U U T T | T T T S S S S | S R R R R R Q | #4 U U U U T T T | T T S S S S S | R R R R R Q U | #4 U U U T T T T | T S S S S S R | R R R R Q U U |
| Hd Pmpr | C C D D D D D | E A A A A A B | B B B B C C C | C D D D D D E | A A A A A B B | B B B C C C C | D D D D D E A | A A A A B B B | B B C C C C C |
| A #1 | F F F E I I I | I I H H H H H | G G G G G F F | #3 F F E I I I I | I H H H H H G | G G G G F F F | #2 F E I I I I I | H H H H H G G | G G G F F F F |
| r #2 | J J J J E M M | M M M L L L L | L K K K K K J | #1 J J J E M M M | M M L L L L L | K K K K K J J | #3 J J E M M M M | M L L L L L K | K K K K J J J |
| e #3 | N N N N N E E | Q Q Q Q P P P | P P (0 0 0 0 0) | #2 N N N N E E Q | Q Q Q P P P P | P (0 0 0 0 0) N | #1 N N N E E Q Q | Q Q P P P P P | (0 0 0 0 0) N N |
| a #4 | S R R R R R Q | U U U U U T T | T T T S S S S | #4 R R R R R Q U | U U U U T T T | T T S S S S S | #4 R R R R Q U U | U U U T T T T | T S S S S S R |

(32)

A- E- I- M- Q- U-
B- F- J- N- R- ExBrd:
C- G- K- O- S-
D- H- L- P- T-

*Calendar Holiday

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## APPENDIX TO PLAINTIFFS BRIEF IN COURT OF APPEALS

*A proposed revision of the defendant's Refinery Pumping Department Schedule*

The defendant's Refinery Pumping Department Schedule ("Exhibit A") utilizes capital letters as symbols for the various employees in plaintiff's department, plaintiff being designated by the symbol "O" (*Stipulation of Facts*, para. 23). Weekends during 1977 when plaintiff's weekend assignments conflict with his reserve obligation are underlined.

In order to accommodate the plaintiff's obligation, and provide him with the maximum number of 40-hour working weeks, the schedule must be redesigned so as to schedule other employees for many or all of the plaintiff's conflicting weekends, and, in turn, to substitute plaintiff for other employees' weekend shifts. This should be done so as not to increase materially the total number of weekend days during 1977 for which these employees have been scheduled. The resulting changes should also not result in employees working more than 40 hours in any week, so as to avoid overtime pay.

The following scheme is suggested:

January 15–16:

O work on January 10, 11 for G
G work on January 15, 16 for O

February 19:

O work on February 14 for K
K work on February 19 for O

February 26–27:

O work on February 26, 27 for J
J work on February 23, 24 for O

March 5–6:

O work on March 5, 6 for J
J work on March 2, 3 for O

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May 21, 22:

O work on May 17 for G and on May 18 for J
G work on May 22 for O, and
J work on May 21 for O

June 18–19:

O work on June 13, 14 for N
N work on June 18, 19 for O

July 16:

O work on July 11 for K
K work on July 16 for O

July 23, 24:

O work on July 23, 24 for J
J work on July 20, 21 for O

July 30:

O work on July 30 for J
J work on July 27 for O

August 6, 7:

O work on August 6 for L and on August 7 for G
L work on August 1 for O, and
G work on August 2 for O

August 21:

O work on August 19 for L
L work on August 21 for O

October 15, 16:

O work on October 11, 12 for J
J work on October 15, 16 for O

November 19:

O work on November 14 for G
G work on November 19 for O

December 17, 18:

O work on December 17 for L and on December 18 for G
L work on December 12 for O, and
G work on December 15 for O

December 24:

O work on December 24 for L
L work on December 19 for O

December 31:

O work on December 31 for L
L work on December 26 for O

These changes will result in the following total weekend days assigned to the employees involved:

| *Before Changes* | *After Changes* |
|---|---|
| G - 70 | 72 |
| J - 75 | 72 |
| K - 68 | 70 |
| L - 75 | 73 |
| N - 70 | 72 |
| O - 70 (Monroe) | 71 |

# Supreme Court of the United States

No. 80-298

ROGER D. MONROE, PETITIONER,

*v.*

THE STANDARD OIL COMPANY

ORDER ALLOWING CERTIORARI. Filed November 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

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Supreme Court, U. S.
FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

No. 80-298

# In the Supreme Court of the United States

**October Term, 1980**

ROGER D. MONROE,
*Petitioner,*

vs.

THE STANDARD OIL COMPANY,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## MEMORANDUM IN RESPONSE FOR RESPONDENT THE STANDARD OIL COMPANY

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S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) ..... 8

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## MEMORANDUM IN RESPONSE FOR RESPONDENT THE STANDARD OIL COMPANY

---

This memorandum is submitted on behalf of respondent The Standard Oil Company (hereinafter "Sohio") in response to the petition for a writ of certiorari filed by the Solicitor General on behalf of Roger D. Monroe.[1] Sohio does not oppose the petition. Rather, Sohio urges this Court to affirm the decision of the Sixth Circuit.

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1. Petition for a Writ of Certiorari, filed August 26, 1980, by the Solicitor General on behalf of Roger D. Monroe (hereinafter "Pet.", and its various appendices "App.").

## QUESTION PRESENTED

The Sixth Circuit's decision is much more precise than the government's statement of the question would suggest. The court found that petitioner was not denied any employment benefit existing under the collective bargaining agreement and employment practices at his place of employment. Accordingly, nc discrimination prohibited by 38 U.S.C. §2021(b)(3) existed.

The question presented by the petition is more accurately stated as follows:

> Whether the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 *et seq.*, require an employer to provide a reservist preferential treatment, not available to other employees, in establishing work schedules whenever a conflict exists with any obligation arising by reason of reservist status.

## STATUTORY PROVISIONS INVOLVED

While the government's request for this Court's review is based solely upon 38 U.S.C. §2021(b)(3), this provision must be interpreted in conjunction with 38 U.S.C. §2024(d), which provides in pertinent part:

> Any employee . . . who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training,

such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

## COUNTERSTATEMENT OF THE CASE

The government's statement of the case contains certain misstatements and omissions which need to be clarified for proper consideration of the issues presented by the petition.

1. There has been no claim that Roger D. Monroe was subject to discriminatory treatment in any manner by reason of his reservist status. Monroe has never contended that he suffered any harm in assignments, promotions, rate of pay, or administration of employee benefits by reason of such status. The record established that he was treated the same as other employees in establishing work schedules, and that, like other employees within his bargaining unit, he was freely permitted to exchange scheduled shifts with other employees (App. A 11a; App. D 19a). Monroe's claim stems solely from lost wages arising from his occasional inability to work his regular schedule due to conflicting reserve obliga-

tions; thus the district court described its monetary award as "wages lost as a result of serving his military obligation" (App. D 26a).

2. The government erroneously suggests that Sohio "made no effort to accommodate petitioner" (Pet. 9, n.6). On the contrary, the record shows that Sohio had negotiated provisions in the relevant collective bargaining agreement which permitted Monroe to exchange shifts whenever a conflict existed, and that he availed himself of this option on several occasions[2] (App. A 3a, App. D 19a). The government also states, erroneously, that "it is not disputed" that Monroe's schedule could have been rearranged by the employer whenever he had conflicting reserve obligations. In fact, the difficulties of continually juggling work schedules in a twenty-four hour per day seven day per week continuous process refinery operation for a workforce subject to a collective bargaining agreement were a major point of contention in the lower courts. *See* App. D 18a, 25a.

3. The government states that this case involves periodic attendance at training sessions (Pet. 2). But this case is not limited to the typical one weekend per month training obligation. The statutory provision upon which the government relies, 38 U.S.C. §2021(b)(3), extends to "any obligation as a member of a Reserve component of the Armed Forces". This statute is not limited by frequency or duration of occurrence or by nature of the obligation. What the government in fact seeks through this petition is a ruling applicable to any schedule conflict, no matter how frequently or unpredictably the conflicts occur and no matter whether the cause is

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2. It is unclear from the record whether the "four occasions" noted by the lower courts mean four days or four periods of one or more days.

training or a non-training obligation.[3] Such a ruling, if favorable to the government, would impose a new and significant burden upon employers.

4. The government erroneously suggests that the Sixth Circuit's decision holds a minimum work schedule of 40 hours per week to be a right guaranteed to reservists by 38 U.S.C. §2021(b)(3) (Pet. 4, 9). The court did not so hold; rather, the court properly concluded that this statutory provision is "purely derivative", and that

> . . . we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment. App. A 9a.

5. The government overlooks that it originally alleged Sohio had violated 38 U.S.C. §2024(d) as well as 38 U.S.C. §2021(b)(3). *Compare* Pet. 3 *with* App. A 3a. It has apparently abandoned this argument in view of the Sixth Circuit's recognition that the former section provides no basis for claiming the pay or the preferential scheduling sought on behalf of the petitioner. *See* App. A 8a. This provision nevertheless remains significant for this Court's consideration of the proper interpretation of 38 U.S.C. §2021(b)(3). 38 U.S.C. §2024(d) became part of the protective scheme for reservists in 1950; it specifically addresses an employer's obligations

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3. For example, the absences for which the government seeks compensation in this proceeding include three consecutive weekends in January, 1976. These were obviously not "periodic", and the government never sought to establish below that these were training sessions, rather than some other unanticipated obligation.

with regard to work schedules, employment practices and employee benefits in light of an employee's military training obligations. The subsequently enacted (in 1968) 38 U.S.C. §2021(b)(3) cannot be interpreted, as the government apparently would prefer, as if this pre-existing provision of the same statute no longer existed.

## REASONS FOR AFFIRMING THE DECISION BELOW

### I. THE SIXTH CIRCUIT'S DECISION CORRECTLY RECOGNIZES THAT 38 U.S.C. §2021(b)(3) IS DIRECTED SOLELY TOWARDS DISCRIMINATORY PRACTICES AND IS NOT AN AFFIRMATIVE ACTION MEASURE.

The government's argument, and the initial decision by the district court, are premised upon the interpretation of 38 U.S.C. §2021(b)(3) to require affirmative action by employers to compensate reservists for the inconveniences accompanying reserve obligations. In the district court's words:

> It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be

treated no differently than those who do not accept this obligation. App. D 24a, 25a.

The Sixth Circuit correctly rejected this argument in reversing the decision of the district court, and holding that "section 2021(b)(3) merely requires that reservists be be treated equally or neutrally with their fellow employees without military obligations" (App. A 11a).

The conclusion that 38 U.S.C. §2021(b)(3) protects against discrimination, but that it does not impose affirmative action requirements, is the only conclusion consistent with the statutory structure and legislative history. As this Court noted in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), courts are required "to construe the separate provisions of the Act as part of an organic whole . . .". Prior to the enactment of 38 U.S.C. §2021(b)(3), the predecessor provisions of 38 U.S.C. §2024(d) provided specific protections for reservists whose training obligations conflicted with work schedules. There was no suggestion of the affirmative action now sought by the government. The legislative history of 38 U.S.C. §2021(b)(3) focused upon the general problem of employer discrimination against employees with reserve obligations in such matters as hiring, promotion and assignments. It was not intended to address specific schedule conflicts, since that issue had long since been resolved by 38 U.S.C. §2024(d).

Nor does the language of the statute, cast as it is in the double negative ("[a]ny person . . . shall not be denied . . ."), suggest any meaning other than a straightforward ban on discriminatory practices. In marked contrast is the express affirmative action requirement imposed upon employers in 1974 when Congress addressed the employment problems of Vietnam era and handicapped veterans. *See* 38 U.S.C. §2012.

The government's argument, and the conclusions of those lower courts which have followed it, ignores the statutory language, structure and legislative intent and focuses solely upon an isolated passage from a 1966 House Committee on Armed Services Report on proposed legislation which was not enacted in that Congress. *See* Pet. 7, 8. In fact, this passage was deleted from the committee reports which accompanied the bill as finally passed in 1968 in a subsequent Congress. *Contrast* H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966) *with* H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 8 (1968), S. Rep. No. 1477, 90th Cong., 2d Sess. 3 (1968).

The government's argument also ignores the statement in the same 1966 House Report that "(i)t should be noted that the only substantive changes in existing law relate to . . . the *prohibition against employer discrimination against reservists* who participate in the Reserve or National Guard programs" (*supra*, at 4) (emphasis added).

## II. THE SIXTH CIRCUIT'S DECISION FOLLOWS PRIOR RULINGS OF THIS COURT THAT THE VETERANS' REEMPLOYMENT RIGHTS ACT DOES NOT REQUIRE COMPENSATION FOR WORKING TIME MISSED BY REASON OF MILITARY OBLIGATIONS.

This court has had occasion to review the provisions of veterans' reemployment rights legislation on several occasions, most recently just this past term in *Coffy v. Republic Steel Corp.*, No. 79-81 (June 10, 1980). One consistent principle emerging from this Court's decisions is that the protections of the Act do not extend to employment rights and benefits which are in reality compensation for the actual performance of work as opposed to a reward for length of service. *See Coffy v. Republic Steel, supra*; *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

Yet that is precisely how the government would have the Act extended in this case. The gravamen of its complaint is that Monroe did not work a 40-hour week, and was accordingly not paid for a 40-hour week, because of conflicts between his regular work schedule and reserve obligations. It is not clear whether the government is asking this Court to approve the district court's actual award of pay to Monroe for time not worked (*contrast* Pet. 9 n.6 *with* App. D 25a, 26a). Nevertheless, it is clear that whatever the remedy the government seeks, it is one intended to compensate for the loss of pay for time not worked. There is no basis for such a remedy under this Court's precedent.

## III. RESERVISTS ARE ADEQUATELY PROTECTED BY THE MANDATORY LEAVE OF ABSENCE PROVISIONS OF 38 U.S.C. §2024(d) AND THE NON-DISCRIMINATION PROTECTION OF 38 U.S.C. §2021(b)(3), AS CORRECTLY INTERPRETED BY THE SIXTH CIRCUIT.

The Sixth Circuit's decision reaffirms and leaves intact the comprehensive protection for reservists that Congress has enacted over the years, now embodied in the Vietnam Era Veterans' Readjustment Assistance Act of 1974. It is hyperbole to suggest, as the government does, that protection for reservists is somehow "annulled" (Pet. 9).

The schedule conflicts inevitably associated with reserve obligations are fully protected by 38 U.S.C. §2024 (d). Employers are required to grant leaves of absence, to hold positions available, and to keep "seniority, status, pay and vacation" intact upon the reservist's return. This protection is supplemented by 38 U.S.C. §2021(b)(3), which, as properly read by the Sixth Circuit, protects reservists against discriminatory practices.

Prior to the decision of the district court in this case in February, 1978, there had never been any judicial suggestion that the statutory protection for reservists included the opportunity for reservists to make up or be paid for working time missed while engaged in reserve activities. The government does not, and cannot, argue that the absence of such judicial protection has hampered the functioning of the Armed Forces Reserves through their long history prior to 1978. Similarly, there is no reason to warn of a crisis once this Court lays this spurious notion to rest.

## IV. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE AND ITS INTENT IS CORRECT, AND THAT ADOPTED BY OTHER CIRCUITS IS IN ERROR.

The petition for certiorari is premised upon a conflict among the circuits. In fact, only two courts of appeals have addressed the issue of work scheduling raised by this petition, the Sixth Circuit in this matter and the Fifth Circuit in *West v. Safeway Stores, Inc.*, 609 F.2d 147 (1980).

While there are some critical factual distinctions between the two cases (for example, *West* involved a collective bargaining agreement with an express guarantee of a 40-hour week and it did not involve 24-hour, 7-day work schedules), the interpretations of 38 U.S.C. §2021 (b)(3) adopted by the two courts are in conflict. The government's petition for certiorari makes it clear that it intends to follow the *West* decision except in the Sixth Circuit. This will subject employers (including Sohio, whose subsidiaries have operations in several judicial cir-

cuits) to continuing litigation based upon the same arguments rejected by the Sixth Circuit in this case.[4]

The petition for certiorari presents this Court an opportunity to resolve this conflict at an early stage and to avoid subjecting employers to needless litigation. The interpretation of the statute adopted by the Sixth Circuit in this case is so obviously correct that this Court should grant certiorari for the purpose of affirming.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Sixth Circuit affirmed.

Respectfully submitted,

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September 26, 1980

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4. The decisions in *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, No. 79-757 (Feb. 19, 1980) and *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, No. 79-1331 (Apr. 21, 1980) construe 38 U.S.C. §2021(b)(3) but do not involve the specific issue of work scheduling. While both decisions reach results that can be reconciled with the Sixth Circuit's reading of 38 U.S.C. §2021(b)(3) as an anti-discrimination measure, the rationale adopted by these courts of appeals cannot be squared with that of the Sixth Circuit.

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No. 80-298

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE, PETITIONER

*v.*

THE STANDARD OIL COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

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THE STANDARD OIL COMPANY

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE PETITIONER

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### QUESTION PRESENTED

Whether an employer violates the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*, by depriving a reservist employee of an employment benefit solely because attendance at a military training exercise necessitates the reservist's absence from work on a particular day.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 613 F.2d 641. The opinion of the district court (Pet. App. 17a-26a) is reported at 446 F. Supp. 616.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on January 24, 1980, and a petition for rehearing was denied on April 15, 1980 (Pet. App. 16a). On July 8, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including August 28, 1980 (Pet. App. 27a). The petition for a writ of certiorari was filed on August 26, 1980, and was granted on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

38 U.S.C. 2021(b)(3) provides:

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

## STATEMENT

1. Between May 1975 and August 1976, the period relevant to this action, petitioner was a full time employee at respondent's Lima, Ohio, refinery. The refinery operated 24 hours per day, seven days per week, and the work day was divided into three eight-

hour shifts. Respondent rotated the shifts to which employees were assigned, so that each employee was scheduled to work on five days per week, generally in succession, but with a different five-day sequence each week. The system, therefore, afforded each employee 40 hours of work each week (Pet. App. 2a, 18a).[1] The collective bargaining agreement in force at the refinery permitted employees to exchange scheduled shifts, provided that respondent incurred no overtime or premium pay obligation as a result of the change.[2]

During the same period of time, petitioner was also subject to certain obligations as a military reservist.[3] As a general rule, he was required to train with his unit on one weekend each month and for a

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[1] The parties entered into a stipulation (J.A. 24-40) in the district court concerning the relevant facts.

[2] Article V, ¶ 23 of the collective bargaining agreement between respondent and the Oil, Chemical, and Atomic Workers International Union provided (Pet. App. 19a):

> Employees on shift may, by mutual consent and with the consent of their foreman, change shifts provided such change does not require the payment of overtime or premium pay. Where such changes require the payment of overtime or premium pay, such changes may be made only where there exists a critical need of such changes proven to the satisfaction of the Plant Manager.

[3] It is not clear from the record whether petitioner was a member of the Ready Reserve or the National Guard, but it makes no difference for the purposes of this case. Both Ready Reservists and National Guardsmen are equally entitled to the protection of 38 U.S.C. 2021(b)(3). See S. Rep. No. 1477, 90th Cong., 2d Sess. 1, 5 (1968); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 6 (1968). In this brief, the term "reservist" will be used to encompass both Ready Reservists and National Guardsmen.

two-week period each summer (Pet. App. 2a). In scheduling its employees' work assignments, respondent took no cognizance of petitioner's military obligations and therefore often scheduled his five-day week to include days on which he was obligated to attend reserve sessions. On four of those occasions, petitioner was able to exchange shifts with other employees (*id.* at 3a, 19a). On 24 other days on which his work schedule conflicted with his military training obligations, however, petitioner was unable to arrange an exchange of work assignments, and therefore he worked and was paid for fewer than 40 hours in the corresponding week (*id.* at 3a, 19a-20a). Respondent took no steps to provide petitioner with substituted hours during those weeks to make up for his lost working time (*id.* at 3a). As a result, petitioner lost a total of 192 hours of work and salary over this 15-month period (*id.* at 3a, 20a).

2. Petitioner brought this action in the United States District Court for the Northern District of Ohio claiming that respondent's failure to attempt to schedule his work days to avoid a conflict with his military obligations violated the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*[4] Specifically, he claimed that respondent had violated 38 U.S.C. 2021(b)(3), which provides that no employee shall be denied "any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." Petitioner contended that respondent, in making no attempt to schedule his work to avoid a conflict with his military obligations, denied him the right to work a 40-hour week, an

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[4] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

"incident or advantage of employment" within the meaning of the statute, because of his reserve obligations.

The district court granted petitioner's motion for summary judgment based upon the stipulated facts (Pet. App. 17a-26a). The court found that "being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment" (*id.* at 24a). Accordingly, the court held that petitioner was denied that advantage of employment in violation of the Act because of respondent's failure to make an accommodation in its scheduling to account for petitioner's military obligations. In so holding, the court explicitly rejected respondent's contention that the statute requires only that an employer treat all of its employees in a neutral fashion. Rather, because of the importance of a properly trained military force to the security of the nation, the statute requires "positive action on the part of the employer" to avoid the denial of advantages of employment to reservists (*id.* at 24a-25a). The court entered judgment for petitioner for $1,086.72, the amount of wages lost as a result of respondent's wrongful failure to attempt to provide petitioner with the opportunity to work a 40-hour week during the period at issue (*id.* at 26a).

The court of appeals reversed (Pet. App. 1a-13a). The court agreed with the district court that the right to be scheduled for 40 hours of work per week was an "incident or advantage" of petitioner's employment (*id.* at 7a-8a). But the court of appeals ruled that a condition precedent to the exercise of the right to work 40 hours was petitioner's presence at work on the scheduled days (*id.* at 10a, 12a). The court recognized that petitioner could not be present

on some of those days because of his reserve obligations, but it held that the statute offered no protection against the adverse consequences of these absences. Rather, the court held that the statute protects reservists only against "intentional unequal treatment" or "on-the-job bias" by their employers (*id.* at 10a, 11a). Hence, the statute is satisfied if "collective bargaining agreements and employment rules [are] facially neutral and [are] applied uniformly and equally to all employees" (*id.* at 11a). The court found that this test was met in this case because petitioner's absences were treated just as non-military absences of other employees would have been treated (*id.* at 11a-12a).

The court of appeals admitted that the statute was subject to two possible interpretations, including that adopted by the district court (Pet. App. 10a). But it expressly rejected the district court's holding that the Act requires accommodation of the reservist's schedule, characterizing that interpretation as a "fashioning of exclusive preferential rights" (*id.* at 10a) for reservists that could not be accepted "[i]n the absence of a clear and unambiguous statutory mandate" (*id.* at 11a).

## SUMMARY OF ARGUMENT

The primary purpose of the veterans' reemployment rights provisions (38 U.S.C. 2021 *et seq.*) is "to minimize the disruption in individuals' lives resulting from the national need for military personnel" by providing protection for veterans and reservists against disadvantages in their civilian employment related to their military obligations. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 583 (1977). See also *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328

U.S. 275, 284 (1946). The recognition of different problems facing members of the military over the years has led Congress periodically to expand the protections offered by these provisions.

The long-standing protection for veterans returning from lengthy periods of military service was augmented in 1960 when the statute was amended to provide traditional reemployment rights—"seniority, status, pay, and vacation"—to reservists returning from training sessions of less than three months' duration. These traditional rights, however, did not adequately protect reservists against disadvantages suffered in their daily worklife as a result of their short-term training absences. Congress enacted 38 U.S.C. 2021(b)(3) in 1968 to provide additional protection.

The court of appeals' construction of 38 U.S.C. 2021(b)(3) conflicts with the language and legislative history of the statute and frustrates the congressional intent to minimize economic disincentives to military service. The court below held that Section 2021(b)(3) protects a reservist only against "intentional unequal treatment," not against the application of facially neutral rules. By its terms, however, the statute protects a reservist against the denial of any employment benefit because of his military obligations. It contains no indication that discriminatory intent is required. Indeed, the plain language of the statute, in focusing on problems resulting from a reservist's *obligations*, suggests that it was aimed primarily, not at intentional discrimination, but at the more pervasive problem of the adverse effects upon reservists of facially neutral rules.

This conclusion is supported by the legislative history, which emphasizes that the statute protects re-

servists against employment practices that disadvantage or discriminate against them, but makes no reference to intentional discrimination. Because the essential impact of the reservist's obligations on his civilian employment is his periodic absence from work, it is clear that the statute does not permit absence from work to be used as a ground for denying a benefit when the absence is occasioned solely by a reservist's military commitment.

The court of appeals ignored the well-settled rules for construction of the veterans' reemployment rights provisions in construing Section 2021(b)(3) not to apply to facially neutral employment practices. The provisions are to be construed "as parts of an organic whole and [given] as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285. Nonetheless, the court of appeals interpreted Section 2021(b)(3) narrowly, although it conceded that the interpretation benefiting the serviceman was a possible one, because it found no unambiguous congressional intent to the contrary.

Moreover, the court of appeals' interpretation of Section 2021(b)(3) is contrary to the established purpose and requirements of the reemployment provisions as a whole. In the context of seniority benefits, this Court has emphasized that the statute cannot be satisfied by applying a facially neutral rule and treating a military absence like other personal leaves of absence. The requirement that military absences be placed in a special category is not "preferential treatment;" a reservist is no better off, relative to his fellow employees, for having entered military service. Rather, such special treatment of military absences is necessary in order to attempt to

ensure that veterans and reservists are no worse off for having entered military service. As the Fifth Circuit has noted, if employers are permitted to deny a benefit on the ground that it is conditioned upon presence at work, Section 2021(b)(3) "would be effectively annulled." *West* v. *Safeway Stores, Inc.*, 609 F.2d 147, 149 (1980).

On these facts, it is clear that respondent violated Section 2021(b)(3). Because, as both courts below held, being scheduled for a 40-hour work week is an "incident or advantage of employment" at respondent's plant, the statute requires that benefit to be made available to petitioner in a meaningful fashion. Scheduling petitioner to work hours that conflict with his military obligations does not satisfy this requirement. Thus, respondent had a duty to make reasonable efforts to accommodate petitioner's obligations. There is no evidence to suggest that accommodation would have been unduly burdensome here, and, in any event, it is undisputed that respondent made no effort to accommodate.

## ARGUMENT

### RESPONDENT VIOLATED 38 U.S.C. 2021(b)(3) IN FAILING TO MAKE REASONABLE EFFORTS TO ACCOMMODATE PETITIONER'S TRAINING OBLIGATIONS IN SCHEDULING HIS 40-HOUR WORK WEEK

The court of appeals rejected petitioner's claim because it held that 38 U.S.C. 2021(b)(3) is designed to protect a reservist only against "intentional unequal treatment" or "bias" and thus that an application of "facially neutral rules" cannot result in a statutory violation (Pet. App. 10a-11a). This narrow construction is contrary not only to the con-

gressional intent in enacting Section 2021 (b) (3), as evidenced by its plain language and legislative history, but also to the fundamental principles underlying the veterans' reemployment rights provisions in general.

### A. The Purpose of Section 2021(b)(3) Is To Minimize the Economic Disadvantages Suffered by Reservists in Their Civilian Employment, Whether or Not Those Disadvantages Result From Intentional Unequal Treatment

The veterans' reemployment rights provisions, which are now codified at 38 U.S.C. 2021 *et seq.*, have evolved over the past 40 years to meet different problems encountered by veterans and reservists in their civilian employment as a result of their military service. This Court has had several occasions to interpret these provisions, specifically in connection with seniority benefits for veterans, and it has laid down general principles concerning their construction. In the first case interpreting these provisions, when they applied only to returning veterans, the Court declared that the provisions were designed to ensure that "[h]e who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). Put another way, the veteran "is not to be disadvantaged by serving his country." *McKinney* v. *Missouri K.-T. R.R.*, 357 U.S. 265, 270 (1958). More recently, after the provisions were amended to their present form with the inclusion of additional protection for reservists, this Court declared that "Section 9 of the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel." *Alabama Power*

*Co.* v. *Davis*, 431 U.S. 581, 583 (1977).[5] Moreover, the Court repeatedly has emphasized that the provisions are to be "liberally construed for the benefit of the returning veteran." *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 5. See also, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285.

1. The veterans' reemployment rights provisions had their genesis in the Nation's first peacetime draft law, passed in 1940 (54 Stat. 885, 890), which provided that veterans returning to civilian employment from active duty were entitled to reinstatement to the position that they left or one of "like seniority, status, and pay." 38 U.S.C. 2021(a). In 1951, as part of an effort to strengthen the Nation's reserve forces, Congress extended reinstatement rights to employees returning from training duty. See Pub. L. No. 51, ch. 144, Section 1(s), 65 Stat. 75, 86-87. Subsequently, the Reserve Forces Act of 1955, Pub. L. No. 305, ch. 665, Section 262(f), 69 Stat. 598, 602, provided that employees returning from their active duty for training of more than three months in the Ready Reserve were entitled to the same reemployment rights as inductees, with limited exceptions. In 1960, these reemployment rights were extended to National Guardsmen, Pub. L. No. 86-632, 74 Stat. 467. See 38 U.S.C. 2024(c). In addition, a new section (now codified at 38 U.S.C. 2024(d)) was added in 1960 to deal with problems suffered by employees

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[5] Prior to their recodification in 1974, the veterans' reemployment rights provisions were codified at 50 U.S.C. App. 459, as Section 9 of the Military Selective Service Act of 1967. See *Coffy* v. *Republic Steel Corp.*, No. 79-81 (June 10, 1980), slip op. 2 n.2. The section involved here, 38 U.S.C. 2021(b)(3), was Section 9(c)(3) of that Act, 50 U.S.C. app. (1970 ed.) 459(c)(3).

who had military training obligations of less than three months' duration. This section provided that employees must be granted a leave of absence for such training and, upon their return, must be restored to their position "with such seniority, status, pay, and vacation" as they would have had if not absent for training.

The traditional reemployment rights guaranteed by Section 2024(d), however, were inadequate to deal with the special problems encountered by reservists as a result of their short-term training obligations. Because absences caused by these training obligations are ordinarily of only two days or two weeks duration, there is no significant problem of reservists' not being restored to their position when they return from training. But the necessity for periodic short absences from work does create certain disadvantages in the reservist's daily worklife, which are not a problem in the context of a single lengthy absence of several months or years for military service. Accordingly, the Department of Labor proposed legislation for the purpose of strengthening the existing reemployment protection for reservists. H.R. Rep. No. 1303, 89th Cong., 2d Sess. 1, 8 (1966). See also S. Rep. No. 1477, 90th Cong., 2d Sess. 2, 6 (1968); H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 7 (1968); *Carney* v. *Cummins Engine Co.*, 602 F.2d 763, 765 (7th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The bill containing what is now 38 U.S.C. 2021(b)(3) was passed by the House of Representatives during the 89th Congress, but it did not reach the floor of the Senate in that Congress. H.R. 11509, 89th Cong., 2d Sess. (1966). Section 2021(b)(3) was reintroduced in the same form in the following Congress and was enacted without amendment. Pub. L. No. 90-491, 82 Stat. 790.

The plain language of 38 U.S.C. 2021(b)(3) belies the court of appeals' conclusion that it proscribes only "intentional unequal treatment." The statute provides that an employee "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation" as a reservist. This unqualified language contains no suggestion that an intent to discriminate against reservists is a prerequisite to a violation of Section 2021(b)(3). Intentional discrimination against reservists is a problem that is likely to occur only rarely, and there is no reason to believe that Congress felt it necessary to add a special subsection to deal with such a limited problem. Moreover, the fact that the provision focuses on a reservist's *obligation* and not simply on his status as a reservist, indicates that the thrust of the statutory protection does not relate to bias against reservists *per se*. Rather, Section 2021(b)(3) is aimed at a more pervasive problem—the adverse effects of the application of facially neutral rules that reservists suffer in their daily worklife as a result of their military obligations.

Because Section 2021(b)(3) does not contain an implied requirement of intent to discriminate against reservists, it follows from the plain language of the statute that petitioner's reemployment rights have been violated. As both lower courts held (Pet. App. 7a-8a, 24a), the right to be scheduled to work a 40-hour week at respondent's plant is an "incident or advantage of employment." Petitioner was denied that right solely as a result of his reserve obligations, because his absences from work were compelled by conflicts with his military training.

It is true, of course, that the direct cause of petitioner's failure to work 40 hours was his absence

from work on the scheduled days, but those absences were an inevitable result of his military obligations. The statutory requirement that reserve obligations be the cause of the denial of an employment benefit surely must include those cases where the direct cause is an absence from work occasioned solely by those obligations. The major short-term military obligation of reservists is to attend periodic training sessions, and the significant effect of that obligation on the reservist's civilian employment is that it requires his absence from work. The addition of 38 U.S.C. 2021(b)(3) was necessary specifically to deal with disadvantages in a reservist's daily worklife caused by these absences, against which the traditional reemployment rights provisions offer inadequate protection. If the denial of benefits caused by absences attributable to military obligations is not prohibited by Section 2021(b)(3), the provision's protection is of little practical significance. See *West* v. *Safeway Stores, Inc.*, 609 F.2d 147, 149 (5th Cir. 1980).[6]

2. The sparse legislative history supports the conclusion that Section 2021(b)(3) not only prohibits intentional unequal treatment but also seeks to minimize the economic disadvantages suffered by reserv-

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[6] If disadvantages resulting solely from a reservist's absences are afforded no protection from the operation of neutral rules, an employer would be free to deny a promotion to a reservist by making availability on weekends a condition of promotion or could discharge a reservist because of his absence from work on three consecutive days without authorized leave. See *Peel* v. *Florida Department of Transportation*, 443 F.Supp. 451, 453 (N.D. Fla. 1977), aff'd, 600 F.2d 1070 (5th Cir. 1979). Section 2021(b)(3) plainly was intended to prohibit such conduct, regardless of the employer's motivation.

ists, such as petitioner, due to the application of facially neutral rules to their training-related absences. This intent is expressed most clearly in the House Committee Report issued in 1966, when the bill containing Section 2021(b)(3), H.R. 11509, was passed only by the House of Representatives. The Committee explained that the amendment was "designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces * * * to enjoy all of the employment opportunities and benefits accorded their coworkers who * * * do not have a Reserve obligation." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966). The rationale for the amendment was succinctly expressed: "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." *Ibid.*

Section 2021(b)(3) was reintroduced as part of H.R. 1093 in the 90th Congress and enacted in the identical form in which it had passed the House in 1966. The discussion of the amendment in the 1968 committee reports was more abbreviated than in 1966 and contained no statement of the rationale underlying the amendment. The House Report did state that the amendment was intended to alleviate the increasing problem of "[e]mployment practices which disadvantage employees with Reserve obligations." H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968). The Senate made no change in the text of Section 2021(b)(3) as introduced in the House. The Senate Report contained a paragraph that was a condensed version of the text of the House Report concerning Section 2021(b)(3), with several editorial changes. It identified the problem to be remedied by the bill

as "[e]mployment practices that discriminate against employees with Reserve obligations." S. Rep. No. 1477, 90th Cong., 2d Sess. 2 (1968).

Contrary to the finding of the court of appeals (Pet. App. 11a), the 1968 legislative history does not reflect a congressional intent to limit the application of Section 2021(b)(3) to instances of bias or intentional unequal treatment of reservists. The reports make no reference to intentional discrimination, but focus instead on employment practices that disadvantage or discriminate against reservists. Plainly, Congress was concerned about the adverse impact of certain employment practices, which may not be discriminatory in and of themselves, upon reservists because of their periodic absences from work in order to satisfy military obligations.[7]

In sum, Section 2021(b)(3) was intended to protect reservists against the denial of employment benefits through the operation of facially neutral rules. The congressional intent, explicitly stated in 1966, was to ensure that reservists' economic well being would be disrupted to the minimum extent possible. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 583.

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[7] This concern is more evident in the House Report, where the word "disadvantage" clearly connotes an inevitable effect of a practice rather than an intent to discriminate. The Senate Report, although it uses the word "discriminate," also focuses on the effect of employment practices. "Discriminate" may connote bias where it modifies the word "intent," but generally refers as well to inequitable effects that may occur even in the absence of an intent to discriminate. Thus, even where the statutory language itself refers only to "discrimination," it may also cover the situation where a facially neutral employment practice has the effect of treating a discrete group differently. See *Board of Education* v. *Harris*, 444 U.S. 130, 149 (1979).

### B. The Court of Appeals' Interpretation of Section 2021 (b)(3) Is At Odds With Principles Established Under Other Sections of the Reemployment Rights Statute

Application of the principles that this Court has established for the construction of the veterans' reemployment rights provisions compels the conclusion that the court of appeals misinterpreted Section 2021 (b)(3). First, the court of appeals turned on its head the long-established principle that the provisions are to be liberally construed in favor of the veteran. See *Coffy* v. *Republic Steel Corp.*, *supra*, slip op. 5. Although it found that the district court's reading of the statute in favor of the reservist—that the application of facially neutral rules may violate Section 2021(b)(3)—was a plausible interpretation, the court of appeals held that its own narrow view of the statutory protection must be adopted "[i]n the absence of a clear and unambiguous legislative mandate to the contrary" (Pet. App. 10a-11a). Second, the court of appeals failed "to construe the separate provisions of the Act as parts of an organic whole" (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285), although it did pay lip service to that principle (see Pet. App. 8a). In fact, the court of appeals' interpretation of Section 2021(b)(3) is at odds with the fundamental purpose and established requirements of the reemployment rights provisions as a whole.

The general objective of the veterans' reemployment rights provisions is to minimize the disadvantages suffered by veterans and reservists in their civilian employment. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 583; *McKinney* v. *Missouri K.-T. R.R.*, *supra*, 357 U.S. at 270; *Fishgold* v. *Sullivan*

*Drydock & Repair Co., supra,* 328 U.S. at 285. Whether these provisions have been violated depends upon the effect on the veteran or reservist, not on the employer's motive.[8] Thus, a returning veteran is entitled to reinstatement at the seniority level that he would have reached had he not entered the military, even if a lower level of seniority would result from the application of the employer's facially neutral rules with no discriminatory intent. See, *e.g., Coffy* v. *Republic Steel Corp., supra; Alabama Power Co.* v. *Davis, supra.* The court of appeals, however, refused to interpret Section 2021(b)(3) as requiring an employer to go beyond its facially neutral rules in accommodating a reservist's military obligations, explaining that such an interpretation would entail "preferential treatment" for reservists (Pet. App. 11a). This erroneous characterization of petitioner's contention is based upon a fundamental misperception of the reemployment rights provisions.

In asking that he not be denied the right to work a 40-hour week because of his military obligations, petitioner is seeking the same treatment as other employees without reserve obligations, not preferential treatment. At respondent's refinery, all employees are scheduled to work 40 hours, and respondent will not rearrange the schedule to accommodate personal leaves of absence due to illness or other reasons. Petitioner, who is as likely to require personal leaves of absence as any other employee, is equally bound by this rule and is entitled to no special consideration regarding non-military leaves of absence. But if peti-

[8] It has always been recognized that good faith is not a defense to an action for damages for violation of the statute. See, *e.g., Teamsters Local 612* v. *Helton,* 413 F.2d 1380, 1385 (5th Cir. 1969).

tioner is to be placed on an equal footing with his fellow employees, his military absences cannot simply be treated as personal leaves of absence. A reservist's absences result from obligations that other employees have not assumed, and it is the primary purpose of the veterans' reemployment rights provisions to protect the reservist against disadvantages that would otherwise be caused by these obligations.

Thus, the statute does require special treatment of the reservist's *absences*—they cannot be equated with other absences for the purposes of applying the employer's rules. But this special treatment is not preferential treatment for the *reservist*; he does not gain any advantage relative to his fellow employees by becoming a member of the military. To the extent that it makes sense to characterize this special treatment of military absences as a "preference," it is a preference that has been mandated by Congress. See *Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060, 1067 n.7 (S.D. Fla. 1978).[9]

This Court has repeatedly rejected the argument that the requirements of the statute may be satisfied by treating military obligations as personal leaves of absence. In *Alabama Power Co.* v. *Davis*, *supra*, for example, the Court held that a veteran was entitled to have his military service years credited toward the accrual of his pension benefits although the pension plan provided that "[e]mployees on leave of

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[9] The court of appeals recognized that Section 2024(d) "creates special rights for reservists" (Pet. App. 8a). It gave no explanation why Section 2021(b)(3), which was designed to expand the protections of Section 2024(d) that Congress deemed inadequate, should be construed only to guarantee "neutral" treatment for reservists despite the congressional intent to create special rights in Section 2024(d).

absence without regular pay" did not have that time credited toward pension benefits. See 431 U.S. at 591. Similarly, in *Coffy* v. *Republic Steel Corp.*, *supra*, the Court held that a veteran's service time had to be counted in computing supplemental unemployment benefit (SUB) credits although employees on leaves of absence did not accrue these credits. See slip op. 7. Clearly, the reemployment rights provisions are not satisfied by treating military absences as other leaves of absence are treated under a benefit plan or collective bargaining agreement.[10] A different rule would violate the basic principle that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285.

The lower courts have recognized that Section 2021(b)(3), when read in harmony with the other reemployment rights provisions, must protect reservists against the adverse effects of facially neutral rules. Indeed, on facts almost identical to those in the instant case, the Fifth Circuit has held that an employer must accommodate a National Guardsman's training obligations in scheduling his 40-hour work week. In *West* v. *Safeway Stores, Inc.*, *supra*, employees were guaranteed a 40-hour work week, but that guarantee was negated if an employee was absent on a scheduled day. West was treated as any other "absent" employee when his weekend training duties conflicted with his scheduled work days. In holding that the employer's conduct violated the stat-

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[10] This principle applies to all benefits protected by the statute, not only those that involve seniority or length of service. See *Foster* v. *Dravo Corp.*, 420 U.S. 92, 99 n.7 (1975).

ute, the court of appeals recognized that West was seeking not preferential treatment, but only "the same benefits secured to other employees." 609 F.2d at 149. The court explicitly rejected the employer's contention that the guarantee of a 40-hour week was conditional on the presence of the employee. If that argument were accepted, the court observed, Section 2021(b)(3) "would be effectively annulled [because] [t]he essence of reserve duty in this context is absence from work." *Ibid.* Thus, the court concluded that "the congressional intent that employees not be penalized for serving their country" required the employer to accommodate West's training obligations and provide him with a 40-hour work week. *Id.* at 150-151.

Two other courts of appeals have also rejected the narrow construction given to Section 2021(b)(3) by the court below. In *Carney* v. *Cummins Engine Co., supra,* the Seventh Circuit ruled that an employer violated Section 2021(b)(3) in charging a National Guardsman with missed overtime opportunities on days when he was absent from work because of his military obligations. The court noted that the "clear import" of the statute was to extend to reservists protection from a wide variety of economic disadvantages that result from their training absences—protection that would not be appropriate in the context of longer-term absences of veterans and that goes beyond benefits relating to "seniority, status, pay and vacation," which are guaranteed to reservists by 38 U.S.C. 2024(d). 602 F.2d at 766. And in *Carlson* v. *New Hampshire Dept. of Safety,* 609 F.2d 1024 (1979), cert. denied, 446 U.S. 913 (1980), the First Circuit held that an employer violated Section 2021(b)(3) by transferring a

reservist to a less desirable assignment because of conflicts between his military training responsibilities and his work schedule. The court found unavailing the employer's contention that the transfer was based not on the reservist's military obligations but only on his absences. 609 F.2d at 1027 n.5. The fact that the reservist was treated the same as other employees with similar absences did not demonstrate compliance with the statute, because the guarantee to reservists of equal treatment with their fellow employees refers not "to 'those coworkers away on non-military leave of absence' but to the more embrasive class of 'coworkers not having [reserve] obligations.'" *Id.* at 1027, quoting *Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869-870 (N.D. Ohio 1975).[11]

### C. Respondent Violated Section 2021(b)(3) on the Facts of This Case

Applying the correct interpretation of Section 2021 (b) (3) to the facts of this case, it is apparent that the court of appeals erred in holding that respondent did not violate the statute. Both the district court (Pet. App. 24a) and the court of appeals (*id.*

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[11] In addition, several district courts have found that Section 2021(b) (3) protects reservists from the denial of benefits such as holiday pay and overtime opportunities because of their military absences, even though a non-military absence would be legitimate grounds for such a denial. See *Kidder* v. *Eastern Air Lines, Inc., supra*; *Hanning* v. *Kaiser Aluminum and Chemical Corp.*, 82 Lab. Cas. ¶ 10,070 (E.D. La. 1977); *Lott* v. *Goodyear Aerospace Corp., supra.* See also *Hawes* v. *General Motors Corp.*, 87 Lab. Cas. ¶ 11,713 (N.D. Ohio 1979). But see *Breeding* v. *TRW, Inc.*, 477 F. Supp. 1177 (M.D. Tenn. 1979), appeal pending, No. 79-1629 (6th Cir.).

at 7a-8a) found that the right to be scheduled for a 40-hour work week was an "incident or advantage" of petitioner's employment at respondent's refinery.[12] If this right is to have any meaning, the hours must be scheduled such that it is not impossible for an employee to work them.[13] Thus, respondent cannot be said to have complied with the statute simply because a schedule was issued that included 40 hours for petitioner, where those hours conflicted with his military obligations. Congress' intent in enacting Section 2021 (b) (3) was to protect meaningful benefits, not illusory ones. As this Court said in the seniority context in *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966), the statutory requirement cannot be satisfied by granting veterans seniority "in some general abstract sense and then denying them the perquisites and benefits that flow from it." Similarly, the statutory requirement cannot be satisfied here by scheduling a reservist for 40 hours of work when it is impossible

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[12] This conclusion was based on the established custom and practice at the refinery. Such practices, along with the specific language of a collective bargaining agreement, are the source of employee rights under the statute. See *McKinney* v. *Missouri K.-T. R.R., supra*, 357 U.S. at 273-274; *Barrett* v. *Grand Trunk Western R.R.*, 581 F.2d 132, 136 (7th Cir. 1978), cert. denied, 440 U.S. 946 (1979). Section 2021 (b) (3) does not guarantee to all reservists the right to work a 40-hour week; the statutory protection depends upon whether employees have that right at the reservist's particular place of employment.

[13] For example, it would surely be a breach of a non-reservist employee's right to a 40-hour week if he were scheduled to work in two different places at the same time, or to work 40 hours in a row.

for him to meet that schedule because of a conflict with his training obligation.[14]

Section 2021(b)(3) requires that a reservist's opportunity to work and earn his pay not be denied because of his military obligations. It does not require, however, that a reservist be paid for hours that he does not work.[15] There may be situations where it is impossible or unduly burdensome for an employer to accommodate a reservist's military absences in its scheduling so that he can be given the opportunity to work. In those situations, the statute would not be violated by the failure to accommodate.[16] Thus, for example, petitioner is not entitled to compensation for work weeks lost because of his mandatory attendance at a two-week summer training ses-

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[14] Under the court of appeals' view, Section 2021(b)(3) would have been violated here only if respondent had, for some perverse reason, issued a schedule that did not give petitioner his complement of 40 hours. That violation could easily have been cured, presumably, by amending that schedule to include additional hours for petitioner on days when it would be impossible for him to work because of his military obligations. It is exceedingly unlikely that Congress intended the statutory protection to be so flimsy.

[15] Petitioner, of course, was awarded compensation in the district court to repay him for the hours of work that he was denied. But this award was a remedy for respondent's violation of the statute in refusing to provide petitioner the opportunity to work 40 hours. Where an employer offers a reservist substituted hours to accommodate his military obligations, he must work those hours in order to be paid. See *Carney* v. *Cummins Engine Co., supra*, 602 F.2d at 766 n.3.

[16] Cf. 38 U.S.C. 2021(a) (returning veteran must be restored to his prior position or one of like seniority, status, and pay "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.")

sion. The statute only requires an employer to take reasonable steps to accommodate the reservist. See *West* v. *Safeway Stores, Inc.*, *supra*, 609 F.2d at 150 n.8; *Carlson* v. *New Hampshire Dept. of Safety*, *supra*, 609 F.2d at 1027 n.6.

In this case, the record contains no evidence that it would have been unduly burdensome for respondent to accommodate petitioner's training schedule. Indeed, it is undisputed that respondent made no effort to do so. See J.A. 26; Pet. App. 3a.[17] Under these circumstances, there can be little doubt that respondent violated Section 2021(b) in denying petitioner the opportunity to work a 40-hour week. The court of appeals' contrary conclusion unnecessarily presents a reservist with a choice between discontinuing his service in the reserves and foregoing the full benefits of his civilian employment. The statutory protection for veterans and reservists helps to eliminate such a disincentive to military service by easing its adverse economic consequences. Unless the court of appeals' interpretation of Section 2021(b)(3) is rejected, this congressional purpose will be thwarted,

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[17] The court of appeals' suggestion that any duty to accommodate was satisfied by the provision of the collective bargaining agreement permitting employees to switch shifts is mistaken. The court's misunderstanding of the thrust of the veterans' reemployment rights provisions is evidenced by its comment that petitioner's inability to work 40 hours was "attributable to the lack of cooperation on the part of his fellow employees" (Pet. App. 12a). It is not the responsibility of a reservist's fellow employees to act on their own initiative to minimize the economic dislocation in reservists' lives resulting from their military obligations. Congress has placed that responsibility on their civilian employers. See H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).

and the effort to strengthen the Nation's reserve forces will be impaired.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 80-298

# In the Supreme Court of the United States

**October Term, 1980**

ROGER D. MONROE,
*Petitioner,*

v.

THE STANDARD OIL COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENT THE STANDARD OIL COMPANY

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## QUESTION PRESENTED

Whether the reemployment provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 *et seq.*, require an employer to provide an employee-reservist preferential treatment, not available to other employees, by altering the employer's regular fixed work schedule whenever the employee-reservist has a schedule conflict with any obligation arising by reason of reservist status exists?

## RULE 28.1 STATEMENT

The Standard Oil Company ("Sohio") is an Ohio corporation; a majority of its voting stock is owned by The British Petroleum Company Limited. Sohio's subsidiaries and affiliates, other than wholly-owned subsidiaries, and their respective states of incorporation, are as follows: Alyeska Enterprises, Inc. (Alaska); Alyeska Equipment Company (Alaska); Alyeska Pipeline Service Company (Delaware); Algers, Winslow & Western Railway Co. (Indiana); Atlas Supply Company (Delaware); BP Alaska Inc. (Delaware); Colonial Pipeline Company (Delaware); Delaware Bay Transportation Company (Delaware); Inland Corporation (Ohio); Iricon Agency, Limited (Delaware); Laurel Pipe Line Company (Ohio); Miami Valley Corporation (Ohio); Mid-Valley Pipeline Company (Ohio); Paraho Development Corporation (Colorado); Ress Realty Company (Ohio); Sohio/BP Trans Alaska Pipeline Finance, Inc. (Delaware); West Texas Gulf Pipe Line Company (Delaware); White River Shale Oil Corporation (Delaware).

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No. 80-298

# In the Supreme Court of the United States

**October Term, 1980**

ROGER D. MONROE,
*Petitioner,*

v.

THE STANDARD OIL COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENT THE STANDARD OIL COMPANY

This brief is submitted on behalf of respondent The Standard Oil Company (hereinafter "Sohio"). Sohio urges this Court to affirm the judgment of the Sixth Circuit instructing that the complaint in this matter be dismissed.

## STATUTORY PROVISIONS INVOLVED

The government's request for relief in this Court is based solely upon 38 U.S.C. §2021(b)(3). Respondent contends that petitioner's claim is governed solely by 38 U.S.C. §2024(d), which provides in pertinent part:

> Any employee . . . who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the

> Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

## COUNTERSTATEMENT OF THE CASE

The dispute between the government and Sohio in this proceeding revolves around one central question: What does the law require of an employer when an employee-reservist is unable to observe his regular work schedule because of his military obligations? Sohio contends that 38 U.S.C. §2024(d) spells out the full extent of its legal obligation. An employer must, as Sohio did here, grant a leave of absence for any day on which such a schedule conflict arises and reinstate the employee-reservist upon his next regularly scheduled work shift following expiration of the leave. The government contends, relying solely upon the vague and general 38 U.S.C. §2021

(b) (3), that Sohio must *also* juggle the regular work schedule for the employee-reservist and his fellow employees to avoid such schedule conflicts. In the alternative, the government contends, again relying solely upon §2021(b) (3), that Sohio must pay an absent employee-reservist for regular scheduled work days he does not work due to reserve obligations.

There has been no claim that Roger D. Monroe was subject to discriminatory treatment in any manner by reason of his reservist status or any obligation arising from that status. Monroe has never contended that he suffered any harm in assignments, promotions, rate of pay, or administration of employee benefits by reason of such obligations or status.[1] The record established that he was treated the same as other employees in assignment of work schedules, and that, like other employees within his bargaining unit, he was freely permitted to exchange scheduled shifts with other employees. Pet. App. 11a, 19a. Monroe's claim stems solely from wages lost on the frequent occasions when he was unable to work his regular schedule due to conflicting reserve obligations and was unable to arrange a voluntary exchange of shifts with other employees; thus the district court described its monetary award as "wages lost as a result of serving his military obligation." Pet. App. 26a.

Sohio's Lima Refinery, located in Lima, Ohio, is a 24-hour-per-day, 7-day-per-week continuous process petroleum refining facility (hereinafter "Lima Refinery" or "Re-

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1. Monroe was first employed as a full-time employee of Sohio in June of 1974. During the period reflected by the record, he received 3 promotions even though his reserve obligations frequently interfered with his ability to work his regular schedule: to Liquid Propane Gas ("LPG") Operator in September 1974; to Oil Movement and Storage ("OM&S") Breaker in September 1976; and to Oil Movement and Storage ("OM&S") Operator in November 1976. J.A. 24, 25.

finery"). At the time in question, the workforce at Lima Refinery consisted of approximately 571-574 employees. J.A. 13. This workforce is covered by a collective bargaining agreement between Sohio and Local 7-264, Oil, Chemical and Atomic Workers International Union. J.A. 25.

Monroe was employed, at all times pertinent, within the Pumping Department at Lima Refinery, which is responsible for a wide variety of tasks throughout the facility. The scheduling practices followed in the Pumping Department are subject to the collective bargaining agreement and are typical of those followed throughout the Refinery. A permanent "Master Letter Schedule" covers each of the various regularly scheduled classifications in the Department. Each employee is assigned a letter designation on the schedule. While these designations will change as employees advance with seniority (the letter "A" designating the most senior employee in the classification covered by the schedule), the shift assignments for any particular letter designation are not changed. J.A. 27, 41.

The basic workweek consists of seven days, Monday through Sunday, with three shifts per day. Each employee is scheduled to work five consecutive days each week on a particular shift. An employee's shift will rotate from week to week, *i.e.*, from the first to the second to the third shift on consecutive weeks, then back to the first shift the following week. Each employee's two consecutive days off will also change every fourth week. The net result of this scheduling method is that, over the course of time, an equitable distribution of the burdens of shift and weekend work will be achieved. Each employee letter designation in a particular classification will be assigned approximately the same amount of time on each one of

the three shifts, and will also receive approximately the same number of scheduled weekend assignments. Pet. App. 2a.[2]

On those occasions when the Master Letter Schedule called for Monroe to work on a weekend and he had a reserve obligation for that same weekend, he was first given the opportunity to exchange the conflicting assignment with other employees in accordance with Article V, paragraph 23, of the collective bargaining agreement. J.A. 25. During the period in question, he was able to arrange such a switch on several occasions.[3] When he was unable to do so, the Refinery granted Monroe a leave of absence for the number of days he requested, and instructed him to report for work at his next regularly scheduled shift following expiration of the leave.

The Refinery would then make arrangements to fill the vacancy created by Monroe's absence, either by substituting an employee from the "extra board" or by the call out of another employee in Monroe's classification for overtime work. Frequently, this would involve the payment of overtime wages to the substitute. J.A. 18.[4] These vacancy filling procedures are those required by the collective bargaining agreement for any type of short-term

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2. *See* J.A. 29-39, setting forth portions of the schedule for certain classifications in the Pumping Department. The excerpts from the Master Letter Schedule set forth therein cover the period from the week beginning December 20, 1976, through the week beginning December 26, 1977. The pattern of the Schedule is fixed and permanent, however, and was followed throughout the entire period relevant to this action.

3. It is unclear from the record whether the "four occasions" noted by the lower courts mean four days or four periods of one or more days.

4. Monroe's absences for which such steps were necessary during the period reflected by the record included not only absences resulting from regular monthly training but also 3 consecutive weekends in January 1976 which do not appear to have been "periodic training" sessions.

absence. The Refinery does not fill such vacancies, whatever the cause, by making changes in the Master Letter Schedule. Arrangements by the employee for a voluntary swap, or the granting of a leave of absence and arrangements by the Refinery for filling the vacancy on a temporary basis, are the sole procedure provided in the collective bargaining agreement.

Petitioner's complaint in the district court was based upon both 38 U.S.C. §2021(b)(3) and 38 U.S.C. §2024(d). The court's ruling, however, was based solely on §2021(b)(3). The district court held that Sohio was required to rearrange its Master Letter Schedule, thereby rescheduling all affected employees, to assure that Monroe could work 40 hours in any week in which he had reserve obligations. It expressly based this holding upon the premise that §2021(b)(3) required affirmative action to aid reservists:

> It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be treated no differently than those who do not accept this obligation. Pet. App. 24a-25a.

The district court recognized that "complexities and burdens" would arise from requiring Sohio to alter its established scheduling practices at Lima Refinery. Nevertheless, it concluded that "basically this is purely a money issue . . ." since it asserted that Sohio could always choose

the alternative of paying the employee-reservist for time not worked should this turn out to be less expensive. Pet. App. 25a.

The court of appeals reversed. First, it determined that Sohio's accommodation of Monroe's absences met the requirements of §2024(d):

> Section 2024(d) creates special rights for reservists. It compels employers to grant leaves of absence to employees who must attend reserve training. In addition, Section 2024(d) entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, "which automatically would have accrued to him if he had remained in the continuous service of his employer." *Aielio v. Detroit Free Press, Inc.*, 570 F.2d 145, 148 (6th Cir. 1978). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. *Id.* at 145. *See also, Foster v. Dravo Corp.*, 420 U.S. 92 (1975). Thus, it is clear that section 2024(d) does not require employers to pay absent reservists for hours not worked.[5] Pet. App. 8a.

Second, the court of appeals rejected the district court's interpretation of §2021(b)(3); it held that "section 2021(b)(3) merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations." Pet. App. 11a. It concluded that Sohio had taken no discriminatory action of the type proscribed by §2021(b)(3):

> The requirement of equal treatment was met in the present case. The parties agreed that appellee was

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5. The government's petition for certiorari and brief on the merits do not challenge the interpretation and application of §2024(d) by the court of appeals.

regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees. Pet. App. 11a.

Having concluded that Monroe was not entitled to relief under either statutory provision, the court of appeals instructed that the complaint in this matter be dismissed. Pet. App. 13a, 14a.

## SUMMARY OF ARGUMENT

Although the veterans' reemployment statute has been before this Court on several prior occasions, this is the first case in which this Court has been called upon to consider those provisions of the statute specifically enacted and designed for military reservists.

Ever since the concept of a part-time military was first introduced, the problem of resolving conflicts between reserve obligations and regular employment schedules has existed. Congress first acted to spell out an employer's obligations in this regard in 1951. Because of ambiguities and uncertainties in the initial legislation, particularly with regard to weekend training obligations, Congress addressed this question again in 1960 in very specific and explicit terms.

Congress's instructions on how to resolve such conflicts were spelled out in what is now 38 U.S.C. §2024(d). This statutory provision requires that a leave of absence be granted to the absent employee-reservist; that the em-

ployee-reservist report back for work at his "next regularly scheduled working period" following the leave; and that, if he does so, his position be made available by the employer with "seniority, status, pay and vacation" preserved.

This provision of the statute survives intact 20 years later. There has never been any suggestion by Congress or by federal agencies responsible for administering the veterans' reemployment statute that this provision is inadequate to its task. There is no dispute that Sohio fully complied with the requirements of §2024(d) in its treatment of Roger D. Monroe's absences.

The government's argument, and the district court's decision, are based upon two fallacies. First, they apply another statutory provision, 38 U.S.C. §2021(b)(3), initially adopted in 1968, to a problem it was never intended to address. Section 2021(b)(3) was adopted for the significant but limited purpose of providing the employee-reservist with statutory protection against discharge, demotion, or other discrimination motivated by reservist status. Congress's sole intent was to provide protection comparable to the protection against "discharge without cause" already existing for the regular military. Congress had no intention of meddling with the detailed solution it had developed eight years earlier for routine problems associated with recurring schedule conflicts.

Second, the government can justify relief under §2021(b)(3), assuming *arguendo* that it has some application, only by reading it as an affirmative action measure that requires preferential treatment for employee-reservists. Such claims for preferential treatment on behalf of the regular military have consistently been rejected by this Court. There is no basis, either in the language of the statute or in its legislative history, to support such a creation of rights for reservists that exceed those available

to the regular military. The isolated (and subsequently deleted) passage from early Congressional deliberations upon which the government relies falls far short of the convincing demonstration of Congressional intent this Court requires before imposing an affirmative action requirement.

Granting the relief sought by the government in this case would lead to several anomalous results. This Court has consistently held that the various provisions of the veterans' reemployment statute do not protect against lost compensation for the actual performance of work, as opposed to the denial of employment benefits which are a reward for length of service. Yet "wages lost as a result of serving his military obligation" are precisely what petitioner has sought in this proceeding. Moreover, the relief requested would alter the scheduling practices and the procedure for accommodating schedule conflicts established by the applicable collective bargaining agreement. Such a result cannot be reconciled with this Court's ruling in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), held that an employer is not required to alter scheduling practices existing under a collective bargaining agreement to accommodate an employee's religious objections to weekend work. *Hardison* reflects a reluctance to interfere with regular scheduling practices which applies with equal force to this proceeding, in view of the express sanction of regular work schedules by §2024(d).

What the government seeks is, in effect, a new and significant statutory right to any preferential treatment necessary to preserve an employee-reservist's regular work schedule and compensation intact. The statutory provision upon which it relies, §2021(b)(3), extends to "any obligation as a member of a reserve component of the armed forces." There is no basis in the statute or its legislative

history to limit the principles espoused by the government to one weekend per month and not apply them to 2-week summer camps or to unscheduled callouts whatever their cause or duration.

The result would be a new and significant burden upon public and private employers that was never contemplated by Congress. There is no need for such additional statutory protection; the existing protections are substantial. Section 2021(b)(3), properly interpreted, protects the employee-reservist against discriminatory treatment. Section 2024(d) provides specific and understandable instructions on how to resolve schedule conflicts and associated claims for pay or benefits. There is no indication that Congress saw it necessary or appropriate to supplement these protections with a far-reaching affirmative action requirement.

The proper method to create such a significant new right would be to approach Congress for further protective legislation. There is no showing in this record, or the government's brief, that any need for such additional, unprecedented protection exists.

## ARGUMENT

### I. SOHIO HAS MET THE STATUTE'S REQUIREMENTS THAT IT GRANT A LEAVE OF ABSENCE WHEN A SCHEDULE CONFLICT ARISES AND THAT IT REFRAIN FROM ADVERSE ACTION DIRECTED AT EMPLOYEE-RESERVISTS.

#### A. Section 2024(d) Grants the Right to a Leave of Absence and Reinstatement Whenever Schedule Conflicts Arise.

The first provisions of the statute providing reemployment rights in the nature of leaves of absence for persons

performing military training duty were enacted in 1951 as part of the Universal Military Training and Service Act. Pub. L. 82-51, 65 Stat. 75 (1951). Because of ambiguities in these initial provisions, particularly as they applied to Reserve or National Guard short-term training requirements, Congress addressed this subject again in the 85th and 86th Congresses (1957-60), ultimately enacting clarifying provisions which are today embodied in §2024(d).[6] As the report of the Senate Committee on Armed Services noted:

> This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, special training or instruction periods that may last for 30, 60 or 90 days. S. Rep. No. 1672, 86th Cong., 2d Sess. 2 (1960).

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6. The bill which contained what became 38 U.S.C. §2024(d) was first introduced in the 85th Congress. H.R. 8522, 85th Cong., 1st Sess. (1957). That bill was favorably reported by the full House Committee on Armed Services on July 24, 1957, H.R. Rep. No. 867, 85th Cong., 1st Sess. (1957), and was passed by the House on August 5, 1957. 103 Cong. Rec. 13622 (1957). The bill was referred to the Senate Committee on Armed Services on August 6, 1957, 103 Cong. Rec. 13723 (1957). The bill was reported by the Senate Committee with an amendment on July 28, 1958. S. Rep. No. 2030, 85th Cong., 2d Sess. (1958). The bill as amended by the Committee was passed by the Senate on August 4, 1958. 104 Cong. Rec. 15963 (1958). The bill died in a conference committee in the 85th Congress.

The bill was reintroduced in the 86th Congress. H.R. 5040, 86th Cong., 2d Sess. (1960). It was favorably reported by the House Committee on February 11, 1960, H.R. Rep. No. 1263, 86th Cong., 2d Sess. (1960), and passed the House on March 7, 1960, 106 Cong. Rec. 4749 (1960). It was referred to the Senate Committee and was reported with an amendment on June 23, 1960. S. Rep. No. 1672, 86th Cong., 2d Sess. (1960). The bill was amended and passed the Senate on June 28, 1960. 106 Cong. Rec. 14681 (1960). The House concurred in the Senate amendment. 106 Cong. Rec. 15007 (1960). The legislation was signed into law on July 12, 1960. Pub. L. 86-632, 74 Stat. 467 (1960).

As enacted in 1960, and still in effect today, §2024(d) requires, first, that the employer grant the employee-reservist a leave of absence for the period of time necessary for training. Second, the employee-reservist's position must be held open by the employer, and upon his return the employee-reservist must be reinstated with "seniority, status, pay and vacation" as if he had not been absent.

Congress paid particular attention to spelling out when and how these reinstatement rights must be exercised. Previously, a 30-day period had been provided for assertion of such rights; as the Department of Labor suggested in supporting the bill which became §2024(d):

> We believe that it would be more realistic, because of the relatively short absence from work in this instance, to shorten the length of the period for application for reinstatement. H.R. 5040 would achieve this result by requiring that application for reinstatement be made at the beginning of the next regularly scheduled working period or within a reasonable time after expiration of the necessary travel time to the place of employment following rejection or release. S. Rep. No. 1672 at 5; H.R. Rep. No. 1263, 86th Cong., 2d Sess. 4 (1960).

This suggestion was adopted by Congress. The employee-reservist is thus required to report for work "at the beginning of the next regularly scheduled working period" when he can reasonably arrive after completion of the training. Section 2024(d) specifically provides that failure of an employee to so report in accordance with his regular work schedule shall make him "subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

The reinstatement rights granted by this section are similar to those provided elsewhere in the statute for regular military personnel.[7] There is no indication in the statute or the legislative history that an employer is under any obligation to pay the absent employee-reservist or to rearrange his regular work schedule to make up for lost work time. Indeed, the specific reference to reinstatement at a "regularly scheduled working period" suggests just the opposite.

### B. Section 2021(b)(3) Precludes Adverse Action Against an Employee-Reservist and Is Not Addressed to Routine Schedule Conflicts.

For regular military personnel, this Court has long recognized that the veterans' reemployment statute contains two quite separate and distinct provisions. First, the returning veteran is entitled to reinstatement with his "seniority, status and pay" intact. 38 U.S.C. §2021(a). The extent of this protection, most particularly how an employee's appropriate status and seniority should be determined in light of intervening developments, has been the subject of most of the litigation in this Court concerning the veterans' reemployment statute. *See Alabama Power Co. v. Davis,* 431 U.S. 581 (1977) (discussing the principal cases).

Second, the returning veteran is given special ancillary protection, for a limited period, against discharge without cause or other adverse employment action that would frustrate the reinstatement protection already provided.

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7. There was only one special protection granted to employee-reservists not provided for regular military personnel. The Senate Committee on Armed Services added a provision which would specifically require that reservists not be charged for vacation time because of any training-related absence, S. Rep. No. 1672 at 3; this was incorporated in the bill as enacted.

*See* 38 U.S.C. §2021(b)(2). As this Court has noted, Congress "added special statutory protection, for one year, against certain types of discharges or demotions that might rob the veteran's reemployment of its substance." *Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278, 285 (1949).

That these two protections are separate and distinct has been recognized by this Court from the first. The first case before this Court interpreting the veterans' reemployment statute, *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), specifically distinguished the two, and this distinction has been clarified in subsequent Court decisions. *See Oakley*; *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947).

In 1960, when Congress enacted the provision which is now codified as §2024(d), it took no action to provide reservists with similar complementary protection against discharges, demotions, or comparable discriminatory conduct. Thus while the employee-reservist had specific reinstatement rights, he had no protection against employer discrimination once those rights had been exercised. The legislative history of §2021(b)(3) indicates that the specific intent of its sponsors and advocates was to fill this gap.[8]

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8. The bill which included what became 38 U.S.C. §2021(b)(3) was first introduced in the 89th Congress. H.R. 11509, 89th Cong., 2d Sess. (1966). Hearings were held before Subcommittee No. 3 of the House Committee on Armed Services in February 1966. *Hearings on H.R. 11509 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 89th Cong., 2d Sess. (1966) [hereinafter cited as *House Hearings - 1966*]. The bill was favorably reported by the full Committee, H.R. Rep. No. 1303, 89th Cong., 2d Sess. (1966), and was passed by the House on March 7, 1966, 112 Cong. Rec. 5016 (1966). No action was taken on the measure by the Senate in the 89th Congress, however.

(Continued on following page)

When the bill was first considered by the House Committee on Armed Services in 1966, the chief Administration spokesman was Hugh W. Bradley, then Chief of the Bureau of Reemployment Rights, U.S. Department of Labor. Bradley described the relevant portions of the bill as follows:

> The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. It is designed to enable reservists and guardsmen, who leave their jobs to perform training in the armed services, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not have military training obligations. The law does not now protect them against discharge without cause as it does with inductees and enlistees who have one year protection

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Footnote continued—

The bill was reintroduced in the 90th Congress. H.R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings were again held before Subcommittee No. 3 of the House Committee, on March 20, 1968. *Hearings on H.R. 1093 Before Subcomm. No. 3 of the House Comm. on Armed Services*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *House Hearing - 1968*]. The bill was favorably reported by the full Committee on April 24, 1968, H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968), and initially passed by the House on May 6, 1968, 114 Cong. Rec. 11779 (1968). Hearings were held by the Senate Committee on Armed Services on July 25, 1968. *Hearings on H.R. 1093 Before Senate Comm. on Armed Services*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *Senate Hearings - 1968*]. The bill was favorably reported by the Committee, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968), on July 26, 1968, with certain amendments not germane here, and passed the Senate on July 29, 1968, 114 Cong. Rec. 24017 (1968). The House concurred in the Senate amendment and made a technical amendment. 114 Cong. Rec. 24373 (1968). The Senate concurred in the House amendment. 114 Cong. Rec. 24999 (1968). The bill was signed into law on August 17, 1968. Pub. L. 90-491, 82 Stat. 790 (1968).

The language of that portion of the bill which became §2021(b)(3) was unchanged throughout its legislative consideration. There was no substantive discussion of the measure on the floor of either chamber. Accordingly, the key portions of the legislative history are the three hearings held on the proposed measure and the three committee reports.

and initial active duty for training reservists who have six months protection.

To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new section 9(c)(3), which the proposed amendments would add to the act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces. *House Hearings - 1966* at 5312.

Testimony by Rear Admiral Burton H. Shupper, U.S.N., was in a similar vein:

The other aspect of H.R. 11509 is the provision that employees should not be denied retention in employment or advantages of employment because of any obligation of a member of a Reserve component of the Armed Forces. After the Berlin and Cuba callups, we received information from our Reserve community that a significant number of reservists were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the standby reserve or those with no reserve status. In fairness, we must emphasize that this reaction on the part of employers appears to be the exception not the rule, and, we believe, is generally not based upon unpatriotic motives but rather on the competitive spirit of business. *House Hearings - 1966* at 5315.

Subsequent colloquy between the subcommittee and the witnesses likewise identified the key problem addressed

by the proposed legislation as discharges, demotions or similar adverse treatment in employment that discriminated against reservists. *See House Hearings - 1966* at 5316 (comments of Congressman Hall); *House Hearings - 1966* at 5319-20 (comments of Subcommittee Counsel Slatinshek).

The House Committee's subsequent report made it clear that its principal purpose was to preclude discharges and other discrimination that denied employment opportunities to reservists. The bill was described as providing "job protection for employees with obligations as members of a reserve component." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966). The Committee specifically noted that "the only substantive changes in existing law relate to . . . the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs." *Id.* at 4.

Hugh Bradley was again the principal spokesman for the Administration in the two hearings held in the 90th Congress. His testimony was substantially the same as two years earlier (with one notable omission—*see* pp. 29-30 *infra*). The only private sector comment on the legislation was from the American Legion, which submitted the following statement for the record:

> The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves should not be denied retention in employment or promotional opportunities solely because of their participation in the Reserve Training Program. They should be afforded all the employment opportunities and benefits as those who do not have training obligations. The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and en-

listees, who have one year protection, and initial active duty for training reservists who have six months protection.

H.R. 1093 would add a new section, 9(c)(3) under the reemployment provisions of the Universal Military Training and Service Act, which would prevent discharge from employment without cause because of membership in the National Guard or Reserves *and would also prevent discrimination in such areas as promotion, training opportunities and pay increases. House Hearings - 1968* at 7477 (emphasis added).

Both the Senate and the House Committee Reports in the 90th Congress reiterate the limited purpose of the additions to the statute. The House Committee noted that:

Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] soley [sic] because of such Reserve affiliation.

It assures that these reservists will be entitled to the same treatment afforded their coworkers without military obligation. H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968).

The Senate Committee described its motivation as follows:

Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations. Section 1 of the bill is intended to protect members of the Reserve components of the Armed

Forces from such practices. S. Rep. No. 1477, 90th Cong., 2d Sess. 2 (1968).

This legislative history paints an unambiguous picture of the purpose of this legislation: to give employee-reservists statutory protection against discharge and discrimination in employment comparable to the statutory protection already provided for the regular military. There is no indication that Congress intended to tamper with or expand the very specific solution for resolving the routine problem of schedule conflicts which it had adopted just eight years earlier.

The government's suggestion that the vague and general language of §2021(b)(3) was considered "necessary specifically to deal with disadvantages in a reservist's daily worklife caused by these absences, against which the traditional reemployment rights provisions offer inadequate protection," Brief for Respondent at 13, is fashioned out of whole cloth. It ignores this Court's repeated holding that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). If this were Congress's purpose, would one not expect some discussion of the inadequacies of traditional provisions, *i.e.*, of §2024(d), in the legislative history? Would one not expect some review of a panoply of "daily worklife" disadvantages suffered by reservists in spite of the existing protections? None of this exists. On the contrary, the consistent focus of the Administration which proposed §2021(b)(3) and the Congresses which considered it was upon one particular set of adverse consequences that potentially flow from an employee's "obligation as a Reservist": the temptation of employers (because of "the competitive spirit of business") to discharge, deny promo-

tions to, transfer to less favorable assignments or other wise discriminate against the employee-reservist.

### C. The Consistent Administrative Interpretation of the Act Requires Only That an Unpaid Leave of Absence Be Granted When a Schedule Conflict Exists.

The Office of Veteran Reemployment Rights within the Department of Labor is generally responsible for assisting persons protected by the Act in pursuing their statutory rights; its role in the administration of the Act has been recognized by Congress. *See* 38 U.S.C. §2025. For several years, the Office and its predecessors have followed the practice of issuing Handbooks and Field Letters for the purpose of advising veterans of their rights under the veterans' reemployment statute. Relevant excerpts from these materials are set forth in Addendum A. They demonstrate that the consistent position of the Office from shortly after the passage of §2021(b)(3) to the current day is that an employer's only obligation in the face of an employee-reservist's schedule conflict is to provide an unpaid leave of absence and to reinstate the employee-reservist when he is again able to report for duty.

For example, in the *Veterans' Reemployment Rights Handbook* issued in 1970, and still in use today, the Office specifically notes that "the law does not require the employer to pay the employee for the time he is absent for military training or even to make up the difference between his military pay and his regular earnings for that period." U.S. Department of Labor, Labor-Management Services Administration, Office of Veterans Reemployment Rights, *Veterans' Reemployment Rights Handbook* 113 (1970).

Similarly, it notes that "the intent of [§2021(b)(3)] is to prohibit any kind of discrimination by the employer against an already employed reservist or guardsman which is motivated by his membership in the reserves or guard or by any consequences of such membership." *Id.* at 115. The examples provided in the Handbook support these interpretations. Of particular interest is the example involving "Maintenance Man M", set forth in full in Addendum A. This example involves a conflict between weekend training duty and a weekend work schedule. The Handbook notes that "under the August 17, 1968, amendments W company must grant M the promotion he clearly would have had but for his reserve obligation, *and solve its Saturday staffing problem in some other way.*" *Id.* at 119 (emphasis added). Nowhere is there any mention of an obligation to reschedule as a result of such a schedule conflict.

Similar examples are carried forward in Field Letters subsequently issued by the Office: Field Letter 23, issued in 1975, and Field Letter 24, issued in 1978. The Field Letters are similarly devoid of any suggestion that an employer has an obligation to adjust the employee-reservist's schedule.

These interpretations of the Act, although not binding on this Court, are entitled to considerable weight. As this Court has previously noted in *Udall v. Talman,* 380 U.S. 1, 16 (1965), "this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *See also United Air Lines, Inc. v. McMann,* 434 U.S. 192, 197 n. 4 (1977). Such deference is particularly appropriate here, since the office that has developed and is applying these interpretations is the very same office within the federal government which served as the principal advocate and spokesman

for the legislation which became §2021(b)(3) in the first place, and its first enunciation of its interpretation came shortly after the legislation was passed.

### D. Sohio Handled Monroe and His Schedule Conflicts Properly.

There is no dispute that Sohio has complied with all relevant requirements of §2024(d). Whenever a conflict existed between Monroe's reserve schedule and a weekend shift assignment, and no voluntary swap was arranged by Monroe for the week in question, he was granted a leave of absence for the required period of time. There has been no attempt to persuade this Court that, upon his return and reinstatement, his rights to "status, seniority, pay or vacation" were infringed in any way.

Similarly, Sohio took no action discriminating against or adverse to Monroe because of his reserve obligation. Indeed, he received several promotions in the period reflected by the record, despite the frequent absences for reserve duty which interfered with his regular work schedule. He was given the same treatment as all other employees in establishing work schedules and his rights under the collective bargaining agreement to exchange shift assignments were not impeded in any way. Monroe, in short, has suffered no adverse consequences proscribed by §2021(b)(3) as a result of his reserve obligations and thus has no valid claim for relief based upon §2021(b)(3).

## II. SECTION 2021(b)(3) IS A NON-DISCRIMINATION MEASURE ONLY AND DOES NOT REQUIRE PREFERENTIAL TREATMENT FOR EMPLOYEE-RESERVISTS.

### A. This Court Has Consistently Rejected Claims for Preferential Treatment Under the Veterans' Reemployment Statute.

This Court has consistently rejected the notion that the remedial provisions of the veterans' reemployment statute require preferential treatment for the individuals they protect. For example, in *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), the seminal case interpreting this statute, this Court rejected a veteran's claim for preferential treatment. The veteran in *Fishgold* claimed that the applicable provisions of the veterans' reemployment statute granted him, after his return to work, a preferred status vis-a-vis his non-veteran fellow employees under the seniority-based layoff provisions of the applicable collective bargaining agreement. In rejecting this claim, the Court noted:

> [N]o step up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more. 328 U.S. at 286.

The Court went on to note:

> There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was give the veteran protection within the framework of the seniority system plus a guaran-

> tee against demotion or termination of the employment relationship without cause for a year.
>
> . . . .
>
> . . . We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was a right to work when by operation of the seniority system there was none then available for him. 328 U.S. at 288-289.

The Court reaffirmed this interpretation of the Act the next year in *Trailmobile Co. v. Whirls,* 331 U.S. 40 (1947), in rejecting a similar claim that the statute provided a veteran with a preferred status of indefinite duration, as against his fellow employees:

> We do not think Congress had in mind such far-reaching consequences for the nationwide system of employment, both public and private, when making the statutory provisions for the veteran's benefit.
>
> . . . .
>
> . . . But if this extraordinary statutory security were to be extended beyond the statutory year the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work, he would acquire indefinite statutory priority over non-veteran employees, a preferred status which we think not only inharmonious with the *Fishgold* rationalization but beyond the protection contemplated by Congress. 331 U.S. at 57-59.

In fact, in the entire history of this Court's interpretation of the various provisions of the veterans' reemployment statute, there is not a single instance in which a reemployed veteran, solely by reason of his protected status under the Act, has been granted a preference over his fellow employees who had continuously been at work and

actively employed. Protected veterans have gained advantage over their fellow employees only where their accumulated seniority, calculated and applied under the "escalator principle" established by this Court, gives them greater seniority under the provisions of the applicable collective bargaining agreement.[9] *See, e.g., Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964); *Barrett v. Grand Trunk Western Railroad Co.*, 581 F.2d 132 (7th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979). The nature of the protection accorded the veteran was aptly described by this Court in *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525-26 (1949):

> It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war. Thus, under the Act the veteran accumulates time toward his seniority while in the service; he also becomes the beneficiary of those gains the achievement of which is the constant thrust of collective bargaining. In other words, the Act gives him the status of one who has been "on furlough or leave of absence" but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is "on furlough", but he is not to be favored

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9. The government asserts that the statutory rights of veterans may on occasion result in their enjoying employment benefits superior to those available to employees on leave of absence from work for other reasons. Brief for Petitioner at 18-19 (citing *Coffy v. Republic Steel Corp.*, 100 S. Ct. 2100 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 591 (1977)). That is of little relevance to this case, however, since petitioner herein seeks work assignment preferences not available to any employee at the Refinery, whether active or on leave of absence.

as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275.

The court of appeals applied this traditional caution to claims for preferential treatment for veterans, rejecting the conclusion "that section 2021(b)(3) imposes upon an employer the affirmative duty to accommodate employees with military reserve obligations by bestowing upon them rights and privileges not generally accorded their fellow employees." Pet. App. 8a. Such caution is fully appropriate in construing §2021(b)(3), since it applies to "any obligation as a member of a Reserve component of the Armed Forces." The statute is not limited by frequency or duration of occurrence or by the cause of any particular obligation. Section 2021(b)(3) has already been applied by the lower courts to such reserve obligations as two-week summer camps, *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 913 (1980); six-week training sessions, *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); and two-month training sessions, *Peel v. Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979). A ruling that any and all such obligations gave rise to a claim for preferential treatment—or, in its stead, a claim for compensation—would be a new, significant and unwise expansion of the statute.[10]

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10. This Court has noted, in another context, that preference for veterans in employment "may reflect unwise policy," since such preferences benefit "an overwhelmingly male class," *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 269, 281 (1979).

### B. The Language and Legislative History of Section 2021(b)(3) Indicate It Was Enacted As a Prohibition Against Discrimination, Not As an Affirmative Action Measure.

There is nothing in the language of §2021(b)(3) itself that suggests an affirmative action requirement. Indeed, the language of the statute, cast as it is in the double negative, "any person . . . shall not be denied," suggests just the opposite, *i.e.*, that it is a ban on adverse treatment.

Furthermore, the section makes no distinction among the various types of employment actions to which it applies; and one would expect similar treatment was intended for each. These listed actions are:

> "retention in employment", *i.e.*, layoff, termination or discharge;
>
> "any promotion", *i.e.*, promotion or advancement;
>
> "or other incident or advantage of employment", *i.e.*, other employment opportunities, comparable to promotions or advancements (*e.g.*, training).

There is, of course, no suggestion in the government's brief that this section requires that employee-reservists be granted preferred status in layoff situations or preferred access to promotional oppcrtunities. How, then, can the language of this section be read to provide preferred access to any "other incident or advantage of employment"?

The intent to enact a non-discrimination measure is confirmed by the legislative history reviewed earlier in this brief. The focus of Congressional consideration was on problems of discrimination against employee-reservists and adverse treatment by reason of their obligations as reservists. There is no suggestion in the Congressional hearings or reports that any affirmative action or preferential treatment was required.

The government's argument is principally based upon one isolated passage from the legislative history:

> If these young men are essential to our defense, then certainly our government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible. H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966).

*See* Brief for Respondent at 14, 15. *See also Carney v. Cummins Engine Co.*, 602 F.2d 763, 765 (7th Cir. 1979), *cert. denied*, 444 U.S. 913 (1980) (citing, in error, the House and Senate Reports from the 90th Congress). This isolated statement is of little weight. It appears only in the House Report from the 89th Congress; it is not contained in either the House or the Senate Report that accompanied the bill as finally enacted in the 90th Congress. *Compare* H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966) *with* H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 8 (1968) *and* S. Rep. No. 1477, 90th Cong., 2d Sess. 3 (1968). Moreover, the language of the very same House Report from the 89th Congress specifically indicates that a non-discrimination measure was intended: "[I]t should be noted that the only substantive changes in existing law relate to . . . the prohibition against employer discrimination against reservists who participate in the reserve or National Guard programs." H.R. Rep. No. 1303, 89th Cong., 2d Sess. 4 (1966). It appears tnat the passage relied upon by the government was lifted verbatim from the hearing statement of Hugh W. Bradley before the House Committee in 1966. *See House Hearings - 1966* at 5313. This passage disappears from Bradley's presentation to both the House and Senate in the subsequent Congress. *See House Hearings - 1968* at 7471, 7472; *Senate Hearings - 1968* at 2, 3. In all three Congressional appearances, it was the clear weight of Bradley's testimony that the purpose of this provision

was limited to providing protection against discharge without cause and comparable adverse treatment. An isolated passage which both the chief spokesman for the bill and the relevant Congressional committes rejected as a rhetorical flourish is a very slender reed upon which to build an affirmative action requirement.

The government also attempts to read some special meaning into the use of the word "obligation", arguing that it connotes some manner of affirmative action purpose. Brief for Petitioner at 12. But this argument takes the word "obligation" out of context; the relevant language in §2021(b)(3) is *"because of any obligation* as a member of a Reserve component of the Armed Forces." (emphasis added). Mr. Bradley's testimony indicated that this language was chosen to focus upon the motivation for the employer action in question, in order to parallel the existing statutory protection against "discharge without cause" for the regular military. *House Hearings - 1968* at 7471; *Senate Hearings - 1968* at 2. The court below correctly rejected the government's argument and read the language utilized in §2021(b)(3) to mean that employee-reservists "must not be subjected to on-the-job bias by their employers because of their prospective military obligations." Pet. App. 11a; *accord, Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024, 1027 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

### C. This Court Requires More Specific Legislative Authorization to Impose an Affirmative Action Requirement.

This Court, construing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, recently refused to approve federal agency regulations attempting to read an affirmative action requirement into that statute since there

was no indication in the statute or legislative history that this was Congress's intent:

> Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[11] *Southeastern Community College v. Davis*, 99 S. Ct. 2361, 2369 (1979).

The reasoning of that decision applies with equal force to the interpretation of §2021(b)(3). The court determined Congress's intent in enacting Section 504 of the Rehabilitation Act by contrasting it with another provision of the same statute which adopted express affirmative action requirements binding upon certain private employers. *See* Rehabilitation Act of 1973 §503, 29 U.S.C. §793. Congress has also demonstrated, in the veterans' reemployment statute, that it has the same ability to recognize where affirmative action is needed and to expressly provide for it. Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1594 (1974), made specific revisions to existing terms of the statute to enact an express affirmative action requirement for certain disabled veterans of the Vietnam era, now embodied in 38 U.S.C. §2012. This affirmative action requirement for Vietnam era veterans was expressly modeled after the similar language and intended scope of Section 503 of the Rehabilitation Act. *See* S. Rep.

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11. The provisions of Section 504 of the Rehabilitation Act of 1973 are again before this Court at the present time. *See Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3332 (1980) (No. 80-317).

No. 1107, 93d Cong., 2d Sess. 34 (1974). It is noteworthy that the very same enactment which made these changes calling for affirmative action also recodified, in Section 404, much of what already existed in the veterans' reemployment rights statute into its current statutory position in Title 38 of the United States Code without making any substantive changes. *See Coffy v. Republic Steel Corp.*, 110 S. Ct. 2100, 2103 n. 2 (1980).

### D. The Non-Discrimination Requirements of Section 2021(b)(3) Are a Vital and Significant Part of the Statutory Scheme.

The government denigrates the significance of the non-discrimination implications of §2021(b)(3), commenting that "there is no reason to believe that Congress felt it necessary to add a special subsection to deal with such a limited problem." Brief for Petitioner at 12. This statement does no justice to the significant and substantial impact of the non-discrimination requirements of §2021(b)(3).

Certainly the Congresses which considered the legislation which became §2021(b)(3) saw a need to protect employee-reservists from discriminatory conduct by their employers. The legislative history reviewed earlier in this brief cites examples of discriminatory terminations and denials of promotional opportunities that, while perhaps not widespread, were a source of significant concern. Similarly, this Court has noted that the comparable protections existing for the regular military are necessary if the reinstatement rights are to have any substance: "[I]t is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it." *Trailmobile Co. v. Whirls*, 331 U.S. at 57.

Court decisions under §2021(b)(3) reflect that, while still perhaps not widespread, discriminatory employer prac-

tices continue. Two of the cases relied upon by the government involve instances of such discrimination: *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980) (transfer to less desirable assignment because of schedule conflicts); *Peel v. Florida Department of Transportation*, 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979) (discharge because of schedule conflicts). *See also Bankston v. Stratton-Baldwin Co., Inc.*, 441 F. Supp. 247 (S.D. Ala. 1977) (discharge because of military-related absences).

The non-discrimination requirements of §2021(b)(3) do in fact have substantial impact upon employers. The frequent absences from work experienced by employee-reservists can have a significant impact upon their productivity and can cause considerable inconvenience to employers who must find alternate means for getting the job done. Yet Congress has dictated, in §2024(d), that the absences must be accommodated and, in §2021(b)(3), that employers cannot avoid their obligations by ridding themselves of employee-reservists either by direct action or by "squeezing them out the door."

## III. THE PREFERENTIAL TREATMENT SOUGHT CONFLICTS WITH THIS COURT'S RULINGS ON WORK REQUIREMENTS AND ON DEFERENCE TO COLLECTIVELY BARGAINED SCHEDULE ASSIGNMENT AND ADJUSTMENT PRACTICES.

### A. A Veteran's Reemployment Rights Do Not Include Compensation for Working Time Lost.

One consistent principle emerging from this Court's decisions is that the "seniority, status and pay" protected

upon a veteran's reinstatement do not include employment rights and benefits which are in reality compensation for the actual performance of work as opposed to a reward for length of service. For example, in *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), this Court held that the "seniority" protected upon a veteran's exercise of his reinstatement rights did not extend to a claim for lost vacation benefits under the applicable collective bargaining agreement. Where an employment benefit "constitutes a bona fide effort to compensate for work actually performed," *id.* at 99, as opposed to length of service, this Court held that there is no statutory protection.

The principle reflected in *Foster* has been consistently followed by the courts. *See Aiello v. Detroit Free Press, Inc.*, 570 F.2d 145 (6th Cir. 1978); *Lipani v. Bohack Corp.*, 546 F.2d 487 (2nd Cir. 1976); *Austin v. Sears, Roebuck and Co.*, 504 F.2d 1033 (9th Cir. 1974). As this Court again summarized the principle in *Alabama Power Co. v. Davis*, "if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of §9." 431 U.S. at 589.

Yet lost compensation for services is precisely what the government would have the Act extended to in this case. The gravamen of its complaint is that Monroe did not work a 40-hour week, and was accordingly not paid for a 40-hour week, because of conflicts between his regular work schedule and reserve obligations. It is not clear whether the government is asking this Court to approve the district court's actual award of pay to Monroe for time not worked. *Compare* Pet. 9 n. 6 *with* Brief for Respondent at 23 and Pet. App. 25a, 26a. Nevertheless, it is clear that the remedy the government seeks is one intended to compensate for

the loss of pay for time not worked.[12] There is no basis under this Court's precedent for such a remedy.

### B. The Remedy Sought Would Override the Scheduling and Schedule Exchange Provisions of the Collective Bargaining Agreement.

The Master Letter Schedule provides a regular and equitable distribution among employees at Lima Refinery of the burdens of shift, weekend and holiday work. There is no provision in the collective bargaining agreement under which an employee can demand a change in the shifts he is assigned under the Master Letter Schedule. Nor is the Refinery free to juggle the Schedule at its whim. Rather, the agreement provides that any employee who is unable or unwilling to work his regular assigned shift may exercise the right to exchange shifts with another qualified employee who is willing to do so. *See* J.A. 25. The record does not indicate that Sohio ever impeded Monroe in his exercise of this right. On those occasions when he was unable to arrange a swap to avoid a schedule conflict, the apparent cause was the unwillingness of his qualified fellow employees to voluntarily exchange shifts.

The relief sought would override this provision of the collective bargaining agreement. Any employee-reservist would be entitled to demand, as a matter of statutory right, that his regular schedule be altered for any week that he was scheduled for weekend duty in conflict with a reserve obligation. The necessary result in this case would be that, involuntarily, his fellow employees would be required

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12. For example, no relief was sought relating to Monroe's absences for two-week summer camps during the period in question, apparently because Monroe was paid for this two-week period in accordance with Sohio's military leave policy. *See* J.A. 27. As the Office of Veterans Reemployment Rights has noted, many employers make such payments voluntarily. *Veterans Reemployment Rights Handbook*, p. 21, *supra*, at 113, 118.

to work more weekend shifts at straight-time pay than they would under the existing equitable allocation of weekend duty. The provision for voluntary exchanges under the agreement would be rendered a nullity, since the employee-reservist would be able to exercise this statutory right without regard to whether he had first made attempts to arrange for a voluntary transfer.

To disturb the scheduling practices established under the collective bargaining agreement in this manner would ignore this Court's traditional deference to such voluntary resolutions of everyday workplace problems. As this Court recently noted, discussing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It does not behoove a court to second-guess either that process or its products. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *California Brewers Association v. Bryant*, 100 S. Ct. 814, 820 (1980) (citations omitted).

*Compare Aeronautical Lodge v. Campbell*, 337 U.S. 521 (1949). The same deference to "this Nation's long standing labor policy" applies with equal force to the interpretation of §2021(b)(3), enacted four years later in 1968.

This case thus presents a radically different issue from that presented in *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980). In *West*, the employee-reservist's claim

was based upon the assertion that he had been denied a right expressly provided by the collective bargaining agreement, *i.e.*, a *guaranteed* 40-hour week. The relief sought was, in effect, an order that the employer live up to the express guarantee it had given in the collective bargaining agreement. In this case, there is no such guarantee.[13] The voluntary exchange provisions of Article V, paragraph 23 provide an employee's sole recourse under the agreement when he is unable to work his regularly scheduled hours. The government in this case, unlike *West*, thus seeks a right that has no basis in the collective bargaining agreement.

### C. Any Obligation to Accommodate Beyond Granting a Leave of Absence Is Fully Satisfied by Permitting Voluntary Exchange of Shift Assignments.

The government's brief suggests that §2021(b)(3) imposes upon employers an obligation to make accommodations beyond those required by §2024(d) in the face of conflicts between an employee-reservist's regular work schedule and military obligations. *See* Brief for Respondent at 23, 24.[14] Section 2024(d), of course, already requires extensive accommodation of such conflicts, and Sohio contends that it has no duty to make further ac-

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13. Article IV, paragraph 5 of the agreement between Lima Refinery and OCAW Local 7-624 states: "This Article defines the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week or of days of work per week."

The existence and applicability of the agreement was stipulated by the parties in the district court, and the language of certain provisions is cited in the record. *See* J.A. 25, 26. Respondent requests that this Court take judicial notice of the actual language of the provision of the agreement cited above. Such notice is appropriate under Rule 201, sections (b)(2) and (f), Federal Rules of Evidence. Fed. R. Evid. 201(b)(2), (f).

14. The lower court authority cited by the government does not support such a proposition. *Carlson v. New Hampshire*

(Continued on following page)

commodation. Even if there were any such obligation, it is clear under *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), that the provisions of the collective bargaining agreement permitting voluntary exchanges of shift assignments fully met its requirements.

In *Hardison,* this Court upheld the discharge of an employee whose religious tenets precluded him from working his regular Saturday work schedule. The applicable statutory standard required the employer to demonstrate that "he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *See* 42 U.S.C. §2000e(j). The employer in *Hardison* assigned weekend work on an involuntary basis. Similarly, at Lima Refinery, the Master Letter Schedule allocates weekend work on an involuntary basis. This Court rejected the suggestion that an employer was required to override its existing system for allocating the burden of weekend work in the face of a statutory command to "reasonably accommodate":

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon seniority system must

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**Footnote continued—**
*Dep't of Safety,* 609 F.2d 1024 (1st Cir. 1979), *cert. denied,* 446 U.S. 913 (1980), in fact, specifically noted that a duty to accommodate schedules would exist, if at all, only "in truly exceptional circumstances," 609 F.2d at 1027 n. 6. In *West v. Safeway Stores, Inc.,* 609 F.2d 147 (5th Cir. 1980), the court's conclusion was not based upon a statutory duty to accommodate but upon the finding that the applicable collective bargaining agreement guaranteed 40 hours of work per week to employees.

> give way when necessary to accommodate religious observances.
>
> . . . .
>
> . . . It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. 432 U.S. at 79-81.

These principles apply with equal force in this case. The specific language of §2024(d) already spells out an accommodation requirement which recognizes an employer's interest in maintaining its regular work schedule. The Master Letter Schedule procedure utilized at Lima Refinery constitutes the customary method at this workplace for making an equitable allocation of undesirable work shifts (holidays, weekends, second and third shifts). If an employee-reservist is able to avoid his regular weekend shift assignments, then one of his fellow employees must work that weekend as a regular shift instead. As a result, his fellow employees will involuntarily work more than their fair share of weekends.

The government suggested at an earlier stage in this proceeding that some form of "payback" scheme could be developed to balance out weekend assignments. *See* J.A. 41-43. Such a payback scheme is, in fact, not possible. The scheme proposed by the government would not even fit the absences of record in this case. For example, it would not accommodate the three consecutive weekends of absence in January 1977 (nor any other absences that were not predictable a year in advance). It would also result in several instances where an employee

would work "back-to-back", *i.e.*, work a third shift on one day and the first shift on the next day, thus working 16 consecutive hours. This would violate the collective bargaining agreement, not to mention common sense safety practices for refinery operations. More significantly, however, any payback scheme would work only if the employee population were static. This is not the case; as changes take place in the workforce through the course of the year, employees advance on the Master Letter Schedule. Finally, the scheme proposed by the government assumed that only one employee-reservist must be accommodated. How could such a scheme be devised when more than one were involved?[15]

The district court in this case was able to distinguish *Hardison* only by suggesting that the statutory protection accorded reserve obligations is superior to the statutory protection accorded religious observances. *See* Pet. App. 24a, 25a. Neither the language nor the legislative history of §2021(b)(3) supports this novel conclusion. *Hardison* must be treated as controlling in this case if any duty to accommodate beyond what is already required by §2024(d) is held to exist. Just as the employer in *Hardison* met this duty by offering to implement a shift exchange scheme, Lima Refinery met any such duty by actually negotiating shift exchange rights as part of the collective bargaining agreement.

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15. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 84 n. 15, noting "the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays."

## IV. ANY ARGUMENTS FOR ESTABLISHING NEW EMPLOYMENT RIGHTS FOR RESERVISTS SHOULD BE ADDRESSED TO CONGRESS.

### A. Proper Application of Current Statutory Provisions Adequately Resolves Conflicts Between Weekend Work Assignments and Reserve Obligations.

The work schedule problems confronted by employee-reservists are adequately addressed by proper application of existing provisions of the statute. Under §2024(d), the right to a leave of absence is established, provided the employee-reservist subsequently reports to work in accordance with his regular work schedule. To the extent any employment benefits may be denied because of military absences, the provisions of §2024(d) calling for reinstatement with "seniority" preserved provide a basis for determining whether such benefits should be accorded. The Sixth Circuit so held in this case. Pet. App. 8a.

The analysis of the district court in *Breeding v. TRW, Inc., Ross Gear Division,* 477 F. Supp. 1177 (M.D. Tenn. 1979), *appeal docketed,* No. 79-1629 (6th Cir. 1979), demonstrates the proper analysis of such claims for foregone compensation or benefits. The district court noted:

> [S]uch rights as the right to work overtime, the right to work a forty-hour week, or the right to paid vacations are contingent benefits of employment which must be earned and should be distinguished from employment benefits based on mere presence at work. 477 F. Supp. at 1182.

The court in *Breeding* focused upon the question of whether a bona fide work requirement existed which justi-

fied denial of the benefit sought to an absent employee-reservist. This is the correct inquiry. The concept of "seniority" under §2024(d), as amplified by this Court's decisions relating to comparable protections for the regular military, is fully adequate for resolving the issues typically presented, such as claims for holiday pay, *Kidder v. Eastern Air Lines, Inc.*, 469 F. Supp. 1060 (S.D. Fla. 1978), or for overtime equalization rights, *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *Lott v. Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975).

The error made by the court in *Breeding*, and by other courts which have considered claims for employment benefits on behalf of absent employee-reservists, including both lower courts in this case, is the mistake of reviewing such claims under §2021(b)(3) at all. Section 2021(b)(3) was not intended as a vehicle for such affirmative claims for benefits; on the contrary, it was solely intended as a basis for asserting claims of discriminatory treatment.

In applying §2021(b)(3) to affirmative claims for benefits, the courts are assuming the impossible task of deciding what the nebulous term "incident or advantage of employment" means, a task more fitted for metaphysicians than judges. These are not common terms in the parlance of employee relations, unlike the terms "seniority" or "discrimination." There is no guiding reference in the statute or legislative history to their meaning. While the district court in this case had "no trouble here holding that being scheduled for a full forty hour week at the defendant's refinery constitutes an incident or advantage of employment for the plaintiff," by what standard did it make that judgment? *Compare* Pet. App. 24a *with West v. Safeway Stores, Inc.*, 604 F.2d at 150. What of the practice of scheduling employees for two days off per

week? Are two days off per week an "incident or advantage of employment"? If an employee-reservist is rescheduled to lose his two days off (*i.e.*, by bridging his weekly schedule around the weekend reserve obligation, as the government seeks here), is he thus denied an "incident or advantage of employment"? This lack of Congressional guidance on how to judge claims for benefits that may be an "incident or advantage of employment" in the routine context of daily worklife is a strong indication that no such application was intended.

### B. Petitioner Seeks a New and Unprecedented Statutory Right That Exceeds Any Right Available to the Regular Military.

The thrust of the government's argument is that §2021(b)(3) must be applied by this Court to new areas beyond those contemplated by the Congress that enacted it. The court of appeals recognized that the principal Congressional concern in enacting §2021(b)(3) was employer discrimination against reservists in retention in employment, or the granting of promotions, training, or other significant employment opportunities. Pet. App. 11a. The government suggests that this is not enough because "intentional discrimination against reservists is a problem that is likely to occur only rarely . . ." Brief for Petitioner at 12. This is, in effect, an argument that because most employers comply with the requirements of an existing statutory provision, this Court is obliged to interpret that statutory provision to impose more stringent requirements upon all employers. Both the premise and conclusions of this argument are erroneous.

As the legislative history indicates, the Congress that considered §2021(b)(3) was expressly advised that the practices to which it addressed itself were not common,

but nevertheless needed a legislative remedy. *See House Hearings - 1966* at 5315. Case law to date under §2021(b)(3) indicates that such intentional employer discrimination still exists and that §2021(b)(3) is the sole method available under the statute to address this continuing problem. *See* pp. 32-33, *supra*.

Under the government's theory, an employee-reservist would be the beneficiary of an absolute statutory guarantee that he suffer no adverse economic consequences whatsoever resulting from his occasional training obligations. An employee-reservist could demand that his employer "pay me or trade me" (*i.e.*, guarantee a change in work schedule, regardless of usual practices, or pay for lost work time if juggling the work schedule creates too many problems). Such a guarantee would go far beyond any right accorded the regular military under the statute; as this Court noted in *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 337 U.S. 265, 271 (1958), the law "does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his had he not been called to the colors." There is no indication in the statute or legislative history that Congress intended to prefer the employee-reservist over the veteran of the regular military by providing such a guarantee of perfect reproduction of what might have been.

### C. Congress Is the Appropriate Forum to Hear Petitioner's Arguments for Additional Statutory Protection.

This Court has consistently noted the importance of assuring that "important choices of social policy are made by Congress, the branch of our government most responsive to the popular will," *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 100 S. Ct. 2844, 2886

(1980) (Rehnquist, J., concurring). This is particularly important with regard to claims for preferential treatment based upon a protected status, since numerous competing interests must often be balanced in resolving such claims. *See Fullilove v. Klutznick,* 100 S. Ct. 2758 (1980).

Employment protection for veterans is one such area where Congress and state legislatures have traditionally performed this function of balancing the competing interests at stake. The net result has been the creation of a comprehensive set of statutory protections and benefits for veterans and military personnel over the years, including the veterans' reemployment provisions set forth at 38 U.S.C. §§2021-2026. This Court has previously recognized and deferred to the critical role of legislative bodies in determining the appropriate extent of employment protection to be accorded veterans and military personnel. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979).

The government has identified what it claims to be a "pervasive problem" which must be addressed: "the adverse effects of the application of facially neutral rules that reservists suffer in their daily worklife as a result of their military obligations." Brief for Petitioner at 12. If such a widespread problem exists, it would not be a new one; the general pattern of reserve obligations, including required absences from work, has not changed significantly over the years. Congress in 1951, 1960 and again in 1968 specifically addressed the implications of reserve-related absences upon an employee-reservist's employment status, and struck a specific balance today embodied in §2024(d) and §2021(b)(3). The government contends this balance does not go far enough to meet the problems encountered by the employee-reservist. If this is the case, then the proper course would be to approach Congress and

ask it to reconsider the balance it has already struck. To ask that this Court adopt, more than a decade after its passage, an artificial, unprecedented and unsupported interpretation of §2021(b)(3) as an affirmative action measure for employee-reservists is not the proper course.

## CONCLUSION

For all of the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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## ADDENDUM A

### Excerpts From Handbooks and Field Letters Issued by the Office of Veterans' Reemployment Rights, U.S. Department of Labor

1. *Veterans' Reemployment Rights Handbook* (1970)

Chapter XVIII: Reservists and Guardsmen - Tours of Training Duty

A statutory amendment effective August 17, 1968 makes it clear and explicit that a reservist or guardsman cannot be discharged from his employment, or denied any promotion or other employment benefit or advantage, because of any obligation arising out of his membership in the reserves, National Guard, or Air National Guard, or because of his absences from work that result from such obligation. The intent of this provision is to prohibit any kind of discrimination by the employer against an already employed reservist or guardsman which is motivated by his membership in the reserves or Guard or by any consequences of such membership. *Id.* at 114, 115.

EXAMPLES

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(9) Horse Trainer H reports back on schedule to his employer, R Racing Stables, from a two-week leave of absence for reserve training duty for which the armed services paid him $100. His normal wages from R Company for the two

weeks would have been $250, so he claims $150 from R Company after reading the provision in the reemployment statute for reinstatement with the "seniority, status, pay, and vacation" the reservist would have had but for his training duty. H had taken his paid vacation for the year in question before going on training duty.

The law does not support his claim. The word "pay," in the provision in question, is construed to mean "rate of pay" in view of the legislative history. If, like many employers, R Company has a voluntary policy of making up the difference in pay in situations like this, then H is entitled to the $150 although the claim is not enforceable as a statutory right. *Id.* at 118.

* * * * *

(12) Employee L is a traveling salesman for UV Cosmetics, Inc., and often spends several days at a time on the road. To fulfill his remaining military obligation, he joins the local reserve unit, which meets every Monday evening. By skillful planning, L is able for several months to avoid conflicts between his job and his reserve meetings, but then the reserve unit changes its meeting time to Wednesday evenings and such conflicts are no longer avoidable. UV Company and L jointly attempt in vain to get L excused from the weekly meetings, and there is no other reserve unit to which he might transfer in the area. UV Company then tells L he must choose between the the reserves and his job with them.

Difficult though it may be, UV Company must work out some plan or schedule that will enable it to live with L's reserve obligation. He is entitled to a leave of absence, including necessary travel time, for each Wednesday evening reserve meeting, and he cannot be dismissed because of the inconvenience this causes the employer. Any attempt to dismiss him ostensibly for other reasons would come under careful scrutiny from the government and the courts because, on the facts stated, there would be evidence that it was only a subterfuge.

(13) Maintenance Man M's reserve unit meets for training duty every Saturday morning. His employer, W Window Company, has a Machine Operator vacancy which it offers M under its policy of always promoting the senior Maintenance Man to such jobs, but since the Machine Operators must often work on Saturdays, it makes the offer conditional on M's getting himself excused from the reserve meetings. M does not wish to jeopardize his status with the reserves, so W Company promotes another employee to the Machine Operator job, and M objects.

Under the August 17, 1968 amendments, W Company must grant M the promotion he clearly would have had but for his reserve obligation, and solve its Saturday staffing problem in some other way. It does not matter whether that obligation was imposed on M by law or voluntarily assumed by him. *Id.* at 119.

2. *Field Letter 23* (1975) (pages unnumbered)

EXAMPLES OF EFFECT OF 1974 AMENDMENTS

* * * * *

(2) Fire Chief Frank Carson of Fenimore City is a Lieutenant Colonel in the Air Force Reserve. To enhance his chances for promotion to full Colonel, he requests a five-month leave of absence beginning May 1, 1975 to attend a military training course of that duration at Randolph Air Force Base, Texas, to which interested reserve officers have been invited. The city refuses to grant the leave on the ground that his services cannot be spared for five months, especially since attendance at the school would be voluntary on his part and the city does not believe it has the authority to grant such leaves. The mayor states that he will have to dismiss Mr. Carson if he leaves his position to attend the school.

Subsection 2024(d) of the Federal reemployment rights law entitles Mr. Carson to the leave requested. However, the Federal statute does not require that the leave must be with pay from the city. Subsection 2021(b)(3) prohibits the city from dismissing him because of his Reserve activities even though his participation in such activities is voluntary. When he returns from the school and reports back to his job promptly, as provided in subsection 2024(d), he will be entitled to reassume the position of Fire Chief with the seniority, status, rate of pay, and vacation that he would have had if his employment had continued without the interruption for attending the Air Force training school.

(3) John Law, a Patrolman on the Traptown police force, is a member of the local National Guard unit which trains for two weeks every summer and one weekend each month. Under Police Department regulations, members of the Guard or Reserves are allowed 15 days off with pay each year for military training duty. The Department allows Patrolman Law time off from his regularly scheduled Saturday work whenever he performs military training on weekends, but requires him to use annual leave for those Saturdays. He object and files a claim with the U.S. Department of Labor.

Under subsections 2024(d) and (f) of the law, the Police Department must permit Law to return to his position after each weekend military training session with the seniority, status, rate of pay and vacation that he would have had if he had not been absent for such training. This means that he cannot be required to use his normal annual leave or vacation time when he goes on either weekend drills or summer encampments with his Guard unit. On the other hand, the law does not require the employer to pay him for any of his military training duty time, although many employers make such payments as a matter of policy.

3. *Field Letter 24* (1978)

EXAMPLES OF EFFECT OF 1974 AMENDMENTS.

Identical to language of Field Letter 23.

No. 80-298

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE, PETITIONER

*v.*

THE STANDARD OIL COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONER**

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1. Respondent's primary contention (Br. 11-23) is that 38 U.S.C. 2024(d) alone governs a reservist's statutory rights with respect to conflicts between his civilian employment obligations and his short-term military obligations. Section 2021(b)(3), of course, was enacted several years after Section 2024(d) with the intent of strengthening the existing protection for reservists. See *Carney* v. *Cummins Engine Co.*, 602 F. 2d 763, 765 (7th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). According to respondent, however, Section 2021(b)(3) protects the reservist only "against discharge, demotion, or other discrimination motivated by reservist status" (Br. 9; see also Br. 15) and thus adds nothing to the protection of Section 2024(d) in this case. This contention simply ignores the plain language of the statute, which prohibits not only the denial of "retention in employment" but also the denial of "any promotion or

other incident or advantage of employment" because of any reserve obligation.[1] Certainly, under Section 2021(b)(3), an employer violates this statute if it discharges a reservist because of his repeated absences due to military obligations, thereby denying him "retention in employment." By the same token, an employer also violates the statute if it denies a reservist any "other incident or advantage of employment" because of his military absences.[2] Here, both courts below agreed that a 40-hour work week was an incident or advantage of employment at respondent's refinery (Pet. App. 7a-8a, 24a); hence, the denial of that benefit to petitioner plainly violated Section 2021(b)(3).[3]

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[1]Respondent briefly adverts to the actual text of the statute, asserting (Br. 28) that the broad phrase "any other incident or advantage of employment" refers only to "employment opportunities, comparable to promotions or advancements (*e.g.*, training)." Respondent offers no support for this narrow definition nor any explanation why Congress sought to protect a reservist's training opportunities but not his opportunity to work 40 hours when his fellow employees without reserve obligations are permitted to do so.

[2]Contrary to respondent's suggestion (Br. 14-21), it is hardly remarkable that Congress elected in Section 2021(b)(3) to protect reservists against the denial of benefits other than retention in employment, even though returning veterans do not have precisely analogous protection. The problems in civilian employment encountered by reservists, such as petitioner's weekend conflicts, are a consequence of recurring, short-term military obligations; such problems would never be faced by a veteran returning from a single long-term period of military service.

[3]Respondent argues (Br. 37 n.13) that the collective bargaining agreement at the refinery did not guarantee a 40-hour work week. As we noted in our opening brief (Br. 22 n.12), however, the statutory protection for veterans and reservists is not restricted to rights established under a collective bargaining agreement, but extends as well to rights established by custom and practice at the workplace. Respondent's belated contention therefore offers no basis for disturbing the factual finding of the courts below that the 40-hour week was an incident or advantage of employment at respondent's refinery. Cf. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). Thus, as the court of appeals itself admitted (Pet. App. 12a-13a), the decision below is squarely in conflict with *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147 (5th Cir. 1980).

Respondent seeks to avoid this conclusion by mischaracterizing petitioner's position as requiring "affirmative action" or "preferential treatment" that is not mandated by the statute (Br. 24-32). The thrust of Section 2021(b)(3) is simply that a reservist may not be denied benefits protected by the statute because of his military absences, even though similar non-military absences from work would be grounds for denial of the benefits. In short, an employer is not permitted to cure the inconvenience caused by a reservist's absences by denying the reservist an "incident or advantage of employment." As respondent recognizes (Br. 33), the result is that the employer "must find alternate means for getting the job done." The necessity for the employer to find such an alternative exists where the statute requires a reservist to be promoted to or retained in a position that ordinarily requires attendance at work on days that conflict with his military obligations. Similarly, where the statute requires that a reservist not be denied a 40-hour work week, an accommodation to a rotating shift schedule may be needed. As we explained in our opening brief (Br. 17-18), the fact that the employer may have to make some adjustment in its ordinary routine in order to comply with the statute does not mean that Section 2021(b)(3) imposes an "affirmative action" or "preferential treatment" requirement.[4] Petitioner asks only that he receive the same benefits as his fellow employees who do not have military obligations; he does not gain any advantage over his fellow employees by becoming a member of the military.

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[4]Indeed, the record reflects that respondent has made adjustments because of petitioner's reserve absences. When petitioner has attended reserve training sessions, his place has been taken by workers from the "extra board" or other employees in petitioner's classification who must be paid overtime (Br. 5). What respondent resists is making adjustments that would protect petitioner against the denial of an employment benefit.

2. Contrary to respondent's repeated suggestions (Br. 21, 27, 34-35), petitioner has never urged that Section 2021(b)(3) requires a reservist to be paid for hours that he does not work. Nor has petitioner urged that the statute imposes an absolute requirement upon employers to provide reservists with employment benefits such as a 40-hour work week. As we noted in our opening brief (Br. 23-24), there may be situations, depending on the particular employment setting, where it is not possible to give a reservist who has weekend training obligations the benefit of a 40-hour work week. In those situations, the failure to provide a reservist an opportunity to work 40 hours does not violate the statute.[5] For example, if a business's operating hours are such that the reservist cannot meet his military obligations and still work 40 hours, the statute does not require the reservist to be paid for 40 hours. The statute, however, does require the employer to pursue reasonable measures to accommodate a reservist's absences so that he will not be denied a benefit given to his coworkers. Where, as here, the employer fails to make reasonable efforts to accommodate the reservist's military obligations, the reservist is entitled to compensation as a remedy for the employer's violation of the statute.

Respondent now suggests (Br. 39-40) that it cannot possibly accommodate petitioner's training schedule. There is nothing in the record to support this assertion. The stipulated facts upon which this case was submitted to the district court state unequivocally that respondent made no effort to

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[5]As we noted in out opening brief (Br. 23-24), it is clear that a reservist is not entitled to compensation for work weeks lost because of attendance at a two-week training session. An employee obviously cannot both attend the two-week training session and be present for work. There is no similar incompatibility between occasional weekend absences and a 40-hour work week. Thus, there is no basis for respondent's suggestion (Br. 27) that, if petitioner prevails here, reservists will be entitled to compensation for working time lost because of lengthy training sessions.

accommodate petitioner's schedule (J.A. 26). Any evidence that it would have been unduly burdensome for respondent to adjust petitioner's schedule should have been presented to the district court; instead, respondent has consistently maintained that it is under no obligation to accommodate petitioner. In any event, it seems apparent that most, if not all, of petitioner's schedule conflicts could be easily resolved by exchanging his scheduled weekend shifts with those of other employees. Contrary to respondent's contention (Br. 39), such exchanges would not necessarily result in additional weekend shifts for petitioner's coworkers; petitioner could work a weekend shift for a coworker on one weekend in return for that coworker's exchanging shifts with petitioner to solve a reserve conflict on another weekend.[6] Certainly, there is no inherent reason why a reservist cannot be scheduled for a 40-hour week despite weekend training obligations. In *West* v. *Safeway Stores, Inc.*, 609 F. 2d 147, 148 (5th Cir. 1980), for example, the employer conceded that it would have been no trouble to accommodate the reservist's schedule.

3. Respondent erroneously contends (Br. 21-23) that the Department of Labor has consistently given Section 202(b)(3) the narrow interpretation urged by respondent in this

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[6]At an earlier stage of this case, petitioner devised an exchange scheme along these lines for petitioner's regular monthly training obligations in 1977 as an illustration. As respondent notes (Br. 39), the suggested scheme is flawed in that it results in a few instances of consecutive shifts. These errors in the illustration, however, hardly suggest that petitioner's military obligations could not be accommodated. First, there is no reason to believe that the illustration could not be improved. Moreover, even assuming that the illustration could not be perfected, it nonetheless clearly demonstrates that most of petitioner's absences could be easily accommodated. Respondent's other objection that the suggested scheme does not account for the absences of record in this case is quite puzzling in light of the fact that the illustration referred only to expected absences in 1977, not the 1975-1976 absences that are the subject of this litigation.

case. Quite apart from the fact that the Department has always maintained the position taken here in litigation on behalf of reservists, the very source relied upon by respondent belies its contention. In discussing the *Veterans' Reemployment Rights Handbook*, respondent urges that an example in the *Handbook* involving "Maintenance Man M" is of particular interest (Br. 22; see Br. A3). In that example, a reservist is first in line for a promotion to a job that requires Saturday work, which conflicts with the reservist's training obligations. The *Handbook* explains that the statute prohibits the employer from conditioning the promotion upon the reservist's availability for work on Saturday. Rather, the reservist is entitled to the promotion, even though the employer will be required to take additional steps to solve its Saturday staffing problem.

Petitioner's position in this case mirrors this example. The "incident or advantage of employment" protected by the statute here is a 40-hour work week, not a promotion. As in the example in the *Handbook*, the employer cannot deny this benefit to petitioner because of his unavailability for work on a given weekend. Rather, petitioner is entitled to be scheduled for a 40-hour week, even though this may require the employer to take some additional steps to adjust the work schedule.

4. Respondent asserts (Br. 37-40) that this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), concerning accommodation of religious needs under Title VII of the Civil Rights Act of 1964, establishes that its rigid scheduling practices did not violate petitioner's statutory rights. But *Hardison* has no application to this case for several reasons. The purposes of Title VII are quite different from those of the veterans' reemployment rights provisions. Title VII is aimed at eliminating employment discrimination

against any employee or group of employees; thus, the Court held that Title VII does not contemplate depriving some employees of their contractual rights in order to accommodate the religious needs of other employees. 432 U.S. at 81. Section 2021(b)(3), on the other hand, is aimed at the protection of a particular class of employees, those with military reserve obligations. As explained in our opening brief (Br. 9-15), Congress has declared that reservists should not be unduly penalized for absences caused by military obligations. Specifically involved in this case is the important congressional purpose of strengthening our nation's reserve forces that is served by minimizing the economic disincentives to reserve duty. See *Peel* v. *Florida Dep't of Transportation*, 443 F. Supp. 451, 459 (N.D. Fla. 1977), aff'd, 600 F. 2d 1070 (5th Cir. 1979). Finally, petitioner here is not seeking the disruption of contractual seniority rights that this Court refused to require in *Hardison*; shift assignments at respondent's refinery are not based on seniority. See Resp. Br. 4-5.[7] Accordingly, *Hardison* casts no light on the proper interpretation of Section 2021(b)(3).[8]

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[7]Nor are any other contractual rights of petitioner's coworkers jeopardized, as respondent claims (Br. 35-37). The collective bargaining agreement provision permitting voluntary shift exchanges need not be altered. However, if petitioner is unable to arrange voluntary exchanges with his coworkers, the employer must make reasonable efforts to accommodate his schedule.

[8]Indeed, respondent implicitly recognizes that the standards applicable under Title VII do not apply here because it concedes that petitioner could not have been discharged for failure to work his scheduled shift, as Hardison was.

## CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

FEBRUARY 1981

No. 80-298

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ROGER D. MONROE,

*Petitioner,*

v.

THE STANDARD OIL COMPANY,

*Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## BRIEF OF AMICUS CURIAE CUMMINS ENGINE COMPANY, INC.

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In The

# Supreme Court of the United States

October Term, 1980

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**ROGER D. MONROE,**

*Petitioner,*

v.

**THE STANDARD OIL COMPANY,**

*Respondent.*

---

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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## BRIEF OF AMICUS CURIAE CUMMINS ENGINE COMPANY, INC.

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## INTEREST OF AMICUS CURIAE

Cummins Engine Company, Inc., a manufacturer of diesel engines, employs a substantial number of reservists and National Guardsmen and encourages its employees to participate in such activities. As an employer, Cummins has a direct stake in this Court's interpretation of 38 U.S.C. § 2021(b)(3). Cummins was involved in one of the cases conflicting with the decision

below, *Carney v. Cummins Engine Company*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Cummins is filing its brief in support of respondent, The Standard Oil Company.

## SUMMARY OF ARGUMENT

Petitioner is before this Court seeking payment for regular hours he missed while absent on reserve duty. The Sixth Circuit dismissed petitioner's complaint. That dismissal should be affirmed.

Congress' efforts in the field of reservists' and National Guardsmen's reemployment rights have been marked by its efforts to provide them the rights as veterans commensurate with the length of the reservists' or Guardsmen's absences. By 1968, when § 2021(b)(3) was enacted, Congress had acted so as to provide most of the rights of veterans to reservists and Guardsmen.

Prior to the enactment of § 2021(b)(3), the major difference between the rights of veterans and those of reservists was in the amount of job protection provided after returning to civilian employment. Veterans were provided one year of protection (§ 2021(b)(1)) as were reservists or Guardsmen on active duty (§ 2024(b)(1)). Reservists or Guardsmen returning from their initial active duty training were given six months protection from discharge (§ 2024(c)). However, while reservists or Guardsmen returning from other training duty were required to be reinstated to their positions (§ 2024(d)), they had no fixed period of protection after their return and were, therefore, subject to intentional discrimination or discharge by their employers.

Congress, recognizing that a fixed period of protection after each absence would be impractical because of the recurring absences of the reservist or National Guardsman, passed § 2021(b)(3). This provision prohibits discharge or discrimination against reservists while they are on the job between absences for training duty.

Petitioner seeks to apply § 2021(b)(3) to the period of his absence and to have it interpreted to require affirmative action so as to receive payment for regular hours he missed during Reserve absences. However, the legislative history of § 2021(b)(3) demonstrates: (1) that Congress did not intend to disturb the application of § 2024(d) to the time period of the reservists' or Guardsmen's absences; (2) that § 2021(b)(3) applies only when the reservist is on the job between absences; and (3) that § 2021(b)(3) requires only neutral, nondiscriminatory treatment.

Accordingly, the decision of the Sixth Circuit dismissing petitioner's Complaint should be affirmed.

## ARGUMENT

**Section 2021(b)(3) Only Applies To A Reservist While On The Job Between Periods Of Military Duty And Does Not Govern The Time Period A Reservist Is Absent Because Of Military Duty Or The Rights And Benefits To Which He Is Entitled Upon His Return.**

Petitioner seeks payment for regular hours which he did not work because he was absent on reserve duty. He seeks such relief on the basis that Standard Oil's failure to rearrange his work schedule violated 38 U.S.C. § 2021(b)(3). The District Court rendered judgment for petitioner on the basis that § 2021(b)(3) requires affirmative action by employers. The Sixth Circuit reversed the District Court and dismissed petitioner's complaint on the basis that § 2021(b)(3) requires only neutral, nondiscriminatory treatment. Petitioner seeks reversal of that dismissal on the basis that (i) § 2021(b)(3) of the Act applies and (ii) that it requires an employer to take affirmative action to guarantee rights and benefits arising during his absence. Petitioner is wrong on both counts. Section 2021(b)(3) is satisfied by neutral treatment of reservists *vis-a-vis* other employees. Furthermore, that section only applies to incidents or advantages of employment occurring while the reservist is on the job between periods of military duty and does not apply to the time a reservist is absent because of military duty.

A review of the history of the legislation establishing the rights of reservists and National Guardsmen shows that, beginning in 1951, Congress has legislated in such a way as to mimic for reservists and Guardsmen the protections afforded veterans where that was possible and to approximate those protections where duplication was impossible. Thus, in 1951, in enacting the Universal

Military Training and Service Act the Congress added a provision (now codified at 38 U.S.C. § 2021 *et seq.*) extending to reservists the reemployment protections of the Act, provided they made application for reinstatement within 30 days. 1951 U.S. Cong. & Admin. News 84, 1502.

Similarly, in enacting the Reserve Forces Act of 1955 providing for special Reserve enlistment programs, Congress provided reemployment rights "substantially the same . . . as [given to] persons on active duty. . . ." so as to "fit the trainee into the general pattern of reemployment rights guaranteed prior-service men and insure that such rights shall be commensurate with their period of duty." 1955 U.S. Cong. & Admin. News 676, 2816.

In 1960, Congress revised the provisions of what is now 38 U.S.C. § 2024(c) to equalize the reemployment rights of reservists and National Guardsmen on identical training assignments. In addition, Congress enacted what is now Section 2024(d) to "provide reemployment protection for trainees who are absent from employment for only a short period of time . . . up to 90 days. 1960 U.S. Cong. & Admin. News 531-532, 3078.

Section 2024(d), along with § 2024(b)(1) and (c), provides a comprehensive regulation of the reemployment rights of reservists and National Guardsmen designed to equalize their rights with veterans, taking into account the period of their absence. Thus, reservists called to active duty other than for training are given the same reemployment rights as returning veterans, including the one-year protection against discharge (38 U.S.C. § 2024(b)(1)). Reservists called to active duty training not exceeding 3 months are given all

of such rights, except the protection against discharge is reduced to 6 months (38 U.S.C. § 2024(c)). Finally, reservists on weekend or annual summer training or on inactive duty training are given leave of absence rights and the rights of veterans, except there is no fixed period of protection against discharge after the reservist's return to work and the reservist must report back to work as soon as possible. In addition, there is a prohibition against charging training time against a reservist's vacation rights (38 U.S.C. § 2024(d) ).

It was against this statutory background that Congress considered and enacted 38 U.S.C. § 2021(b)(3) in 1968. The legislative history of that provision, when viewed against that background, demonstrates that § 2021(b)(3) was not meant to govern the rights of reservists or National Guardsmen with respect to the time period of their absences for military service or to govern their reinstatement but, instead, was meant to protect them while on the job against employer discrimination because of either their past or prospective absences for military duty.

The Senate Report on H.R. 1093, the bill which added Section 2021(b)(3), states that the purpose of the bill was "to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being *discriminated against* in employment because of their Reserve membership. . . ." (Emphasis added.) The Senate Report further states that discrimination against reservists had become an increasing problem, *particularly denial of promotions or discharge*, and that the bill was meant to protect against such discriminatory practices by providing that "reservists [would] be entitled to the same treatment afforded their co-workers not having such military obligations"

(emphasis supplied). S. Rep. No. 1477, 90th Cong., 2d Sess. (1968) reprinted at 1968 U.S. Cong. & Admin. News 3421.

The chart printed in the Senate Report, 1968 U.S. Cong. & Admin. News at 3425 (and also in H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968)), detailing the effect of H.R. 1093—adding Section 2021(b)(3)—noted that under then existing law reservists or National Guardsmen on other than initial active duty training had no job protection. This is in contrast to the fixed periods of job protection granted for other types of military duty. The chart then notes that under H.R. 1093 reservists or National Guardsmen in that situation would be granted "Job Protection" by the prohibition against "Discharge from or discrimination in employment because of membership in [the] reserve or National Guard."

The House Report also documents that Congress intended § 2021(b)(3) to be a substitute for a fixed period of job protection after return from military duty. It explained the purpose of H.R. 1093 as follows:

> **Job Protection for Employees with Obligations as Members of a Reserve Component of the United States.**
>
> . . .
>
> Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] solely because of such Reserve affiliation.
>
> It assures that these reservists will be entitled to the same treatment afforded their co-workers without such military obligation.

> The law does not now protect these reservists against discharge without cause, as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection. H.R. Rep. No. 1303, 90th Cong., 2d Sess. (1968) at 3.

These statements from the legislative history show that § 2021(b)(3) was meant to take the place of a fixed period of protection against discharge and to protect the reservist from employer discrimination while on the job between periods of military duty because of his Reserve obligations. These statements also show that § 2021(b)(3) was not intended to affect the already detailed statutory scheme of leave of absence rights and guarantees of seniority, status, pay and vacation upon return from military training duty.

The testimony of Hugh W. Bradley, Director, Office of Veterans' Reemployment Rights, U.S. Department of Labor (which drafted the bill, H.R. Rep. No. 1303 at 7) also demonstrates that Section 2021(b)(3) was intended to take the place of a fixed period of protection. His testimony before the subcommittee of the Committee of Armed Services considering H.R. 1093 was as follows:

> The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. It is designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their co-workers who do not have military training obligations. *The law does not now protect them against discharge without cause as it does inductees and enlistees, who have one year protection, and initial active duty for training reservists, who have 6 months protection.*

> *To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new Section 9(c)(3), which the proposed amendments would add to the Act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a reserve component of the Armed Forces.* I recommend approval of this provision. (Emphasis added.)

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 90th Cong., 2d Sess. (1968).

This purpose was also reflected in the statement before the House subcommittee of the Director of the National Economic Commission of the American Legion:

> The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves *should not be denied retention in employment or promotional opportunities* solely because of their participation in the Reserve Training Program. They should be afforded all the employment opportunities and benefits as those who do not have training obligations. *The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and enlistees, who have one-year protection, and initial active duty for training reservists who have six-months protection.*
>
> *H.R. 1093 would add a new section, 9(c)(3),* under the reemployment provisions of the Universal Military Training and Service Act *which would prevent discharge* from employment *without cause* because of membership in the National Guard or Reserves, *and would also prevent discrimination in*

> *such areas as promotion, training opportunities and pay increases.* (Emphasis added.)

*Id.* (Statement of Austin E. Kerby.)

In short, the legislative history of the Act and of Section 2021(b)(3) confirms that such section was added by Congress to cover an area not already statutorily regulated—job protection for reservists and National Guardsmen while at work and between periods of training duty other than initial active duty training (Pet. App. at 5a). Section 2021(b)(3) was not meant to affect the already detailed statutory scheme of leave of absence rights and reinstatement rights.[1]

Since the petitioner is not seeking redress for a denial of an incident or advantage of employment which occurred while he was at work and *between* absences for training duty but is seeking pay for time missed from work while *on* training duty, the legislative history of the Act precludes the application of § 2021(b)(3) to such a claim which, instead, is governed exclusively by § 2024(d). And, as correctly noted by the Court below, [Pet. App. at 8a] § 2024(d) "does not require employers to pay absent reservists for hours not worked" since such a right is not an aspect of "seniority, status, pay or vacation" as guaranteed by that section.

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[1] Indeed, since § 2021(b)(3) protects *all* "incidents or advantages of employment" including "seniority, status, pay and vacation" its application to the period of the reservist's absence would render § 2024(d) entirely meaningless and without effect. Such a construction would violate this Court's commands as to the proper construction of the Act. *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1945); *Cf. Kokoszka v. Belford*, 417 U.S. 642, 652 (1974); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Jarecki v. G. D. Searle Co.*, 367 U.S. 303 (1961); *MacEvoy v. United States*, 322 U.S. 102, 107 (1944). However, each section can be given full application when each is applied in its proper time period.

**Section 2021(b)(3) Does Not Require "Affirmative Action" Or "Reasonable Accommodation" Of A Reservist's Schedule But Requires Only Neutral, Nondiscriminatory Treatment By Employers.**

Even if the legislative history of the Act supported the application of § 2021(b)(3) to the petitioner's claim for regular time missed during his Reserve absences, the result reached by the Court below is correct.

As set out above, the legislative history of § 2021(b)(3) amply documents that Congress' intention was to prevent *discrimination* by employers *against* reservists or National Guardsmen because of their Reserve obligations. This purpose is supported by the plain language of the statute that a reservist "shall not be *denied* . . ." any incident or advantage of employment. (Emphasis supplied).[2]

Petitioner and the government do not allege that Standard Oil discriminated against him in connection with his work schedule. Instead, they allege only that Standard Oil did not take "affirmative action" to "reasonably accommodate" petitioner so as to schedule petitioner's work days to avoid any lost time. (Pet. at 3, 4, 8, 9, Pet. Brief at 23-24). However, petitioner and the government point to nothing in either § 2021(b)(3) or in its legislative history indicating that Congress ever even considered imposing upon employers a duty of "affirmative action" or "reasonable accommodation." Indeed, the only language suggested by petitioner to support such a theory is a phrase contained in the legislative history of

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[2] Contrary to the argument made by petitioner and the government (Pet. Brief at 12), the use of the word "denied" in § 2021(b)(3) does connote "intent" as a prerequisite to violation of the statute. "Webster's New Collegiate Dictionary" (Merriam, 1977) at 304.

a nearly identical prior bill (H.R. 11509, 89th Cong., 2d Sess. (1966) ), not enacted by Congress, suggesting that employers have a *moral* obligation to see that a reservist's economic well-being is disrupted as minimally as possible.[3] However, that language does not support a finding that Congress intended Section 2021(b)(3) to convert a moral obligation not to discriminate into a *legal* duty to take affirmative action in favor of reservists. Moreover, *that phrase was deleted* from the legislative history of the Act as passed.

When read as a whole, the legislative history of H.R. 11509 demonstrates that Congress was concerned with intentional discrimination against the reservist while at work and not with changing the scheme of reemployment rights already in existence dealing with the period of the reservist's absence on military duty. For example, the House Report on H.R. 11509 provided:

> The law does not now protect these reservists *against discharge without cause* as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.
>
> To give the reservist a specific period of protection after each tour of training duty would be to perpetuate him in his position indefinitely. The new section 9(c)(3), which the proposed amendments would add to the act, would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces.

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[3] H.R. 11509 was identical with H.R. 1093 with respect to what became § 2021(b)(3). It passed the House but not the Senate in 1966 and was reintroduced and passed by both Houses in 1968 as H.R. 1093.

H.R. Rep. 1303, 89th Cong., 2d Sess. (1966) at 3. Further, in describing the effect of H.R. 11509 on existing law, the Report provided:

> It should be noted that *the only substantive changes in existing law relate to the additional period of military service which would be covered and the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs.*

*Supra*, at 4 (Emphasis supplied).

The testimony before the subcommittee of the Committee on Armed Services considering H.R. 11509 also demonstrates Congress' concern with the period *between* Reserve absences. Hugh W. Bradley testified before the subcommittee in substantially the same manner as he did on H.R. 1093 two years later.[4]

In addition, Rear Admiral Burton H. Shupper testified on behalf of the Department of Defense as follows:

> The other aspect of H.R. 11509 is the provision that employees shall not be denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces. *After the Berlin and Cuba callups we received information from our Reserve community that a significant number of reservists*

[4] A review of Mr. Bradley's testimony before the subcommittee on H.R. 11509 shows that he was the source of the "moral obligation" language in the Committee report. SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 11509 TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 89th Cong., 2d Sess. (1966). Statement of Hugh W. Bradley) However, his testimony before the subcommittee in 1968 did not make any reference to such a *moral* obligation and no reference was made to any such obligation in the legislative history of H.R. 1093. SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, *supra*.

> *were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the Standby Reserve or those with no Reserve status.* . . . (Emphasis added.)

SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 11509, TO AMEND AND CLARIFY THE REEMPLOYMENT PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AND FOR OTHER PURPOSES, 89th Cong., 2d Sess. (1966).

Moreover, the statements made by Congressman Hall during his questioning of Admiral Shupper demonstrate the concern with discriminatory discharge:

> Mr. Chairman. I have been cognizant of this problem for a long time . . . as a result of complaint of some of the reservists in my district. I think I could document many letters referring to what the admiral mentioned after the Berlin callup: *corporations of national stature who happen to be located in the district that I represent were found easing out or dropping people in Ready Reserve status. This of course has flared into the open again as a result (a) of the Navy and Marine Corps involuntary or voluntary extensions and (b) because of the possibility of a general callup.* . . .
>
> And *I don't have much respect for big national corporations that are weeding out reservists who participate in a Ready Reserve. This bill would help to correct that, that is why I am for it.* . . . *Supra,* (Emphasis added.)

This concern was also reflected in the questioning of Mr. Bradley by Mr. Slatinshek, counsel for the subcommittee:

> Mr. Slatinshek. I have one other question concerning the language in the first change that you propose in the bill, and this relates to the term

"obligation" of a member of a Reserve component. *This is the change that you propose to provide job retention rights to reservists who are presumably on inactive duty and who participate in drills and who participate in training operations and this is to preclude the employer from arbitrarily discharging them because of their Reserve affiliation. . . .*

Can you tell the committee whether the term "any obligation as a member of a Reserve component" is limited to the statutory Reserve obligation which, as we all know, is the 6-year period, or does this extend beyond that?

Mr. Bradley. *This covers all reservists and guardsmen who are covered in section 9(g)(4) of the act,* which means that the ready reservist would be covered just like the active reservist.

Mr. Slatinshek. In other words *this language here would provide job retention rights, if you will, to a reservist who has satisfied his statutory Reserve obligation but who voluntarily participants* [sic] *in the Reserve program. . . .*

Mr. Bradley. *That is correct,* anyone in any Reserve component or the National Guard, irrespective of whether it is active or inactive Reserve duty, or, as you say, Ready Reserve, is covered in 9(G)(4) and would be covered in this amendment.

Mr. Slatinshek. Let's assume again for the record that I am an employee of a defense industry, an aircraft company, and I have a very responsible position and my employer—and at the same time I am a member of the Reserve. *My employer feels that my Reserve participation is affecting his capabilities and requests or directs that I leave the Reserve program and in the absence of my doing so that he, of course, will discharge me from my employment.* Under the circumstances that I have related, do you feel that you could properly employ the provisions of this law to restore him to his job in the absence of any showing that the discharge of the employee

> was due to something other than his Reserve affiliation?
>
> Mr. Bradley. Well, there would have to be some evidence that the discharge was due to his military obligation. *We run into this very frequently right now as a matter of fact.*

*Supra*, (Emphasis added.)

Thus, read in context, the legislative history of H.R. 11509 is ample evidence of Congress' concern with the problem of intentional discharge of or discrimination against reservists while at work between periods of military duty.[5] There is nothing to indicate that Congress intended to change the already existing scheme governing the period of the reservist's absence and his return to work—much less to create an "affirmative action" or "reasonable accommodation" obligation with respect to that time period—as suggested by

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[5] Contrary to the assertion by Petitioner and the Government (Pet. at 7, Brief at 15) the Senate Report shows Congress' focus on intentional discrimination (discharge and denial of promotion) as does the testimony of Mr. Bradley, and Admiral Shupper and the comments by Congressman Hall. That testimony and Congressman Hall's comments—specifically about the Berlin and Cuban call-ups and the Vietnam crisis—also belie the assertion that such intentional discrimination "will occur only rarely" (Pet. at 7). In fact, § 2021(b)(3) was passed at a time when the threat of a general callup (like those in the Berlin and Cuban crisis) was very real with the attendant threat of widespread intentional discrimination of the type seen in past mobilizations.

It should also be noted that in Mr. Bradley's testimony before the subcommittee on H.R. 1093 in 1968 he specifically stated that *the testimony given in 1966 on H.R. 11509 applied with full force to H.R. 1093.* SUBCOMMITTEE NO. 3 CONSIDERATION OF H.R. 1093, *supra.*

petitioner and the government and adopted by the Fifth and Seventh Circuits.[6] Rather, as found by the Court below:

> "The legislative history clearly states that section 2021(b)(3) is aimed at combatting discriminatory practices of employers. To this end, section 2021(b)(3) was enacted to ensure that reservists would be 'entitled to the same treatment afforded their co-workers not having such military obligations.' S. Rep. No. 1477, *supra*, at 3421 . . . not [ ] subjected to on-the-job bias by their employers because of their prospective military obligations." (Pet. App. at 11A).[7]

Not only is petitioner's and the government's position without support either in the legislative history or the

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[6] The language of 38 U.S.C. § 2012 and its legislative history (S. Conference Report No. 93-1240, 93rd Cong., 2d Sess. (1974) reprinted at 1974 U.S. Cong. & Admin. News at 6343-6344) imposing an express affirmative action requirement upon employers *vis-a-vis* Vietnam era and handicapped veterans demonstrates that Congress is explicit when creating such an obligation.

[7] If Section 2021(b)(3) were applicable to the time period of a reservist's absence the question to be asked in assessing petitioner's right to relief would be whether Standard Oil discriminated against him because of his Reserve status. An examination of the record discloses that it did not. Paragraphs 9, 10, 11, and 12 of the Stipulation of Facts before the trial court (JA at 25-26) show that petitioner was treated exactly the same as other employees without reserve obligations with respect to scheduling and with respect to the right to switch assignments with other workers in the event of a conflict. Nothing in the record would support a finding that Standard Oil discriminated against petitioner in any of these regards. Instead, as fully appears from the record and petitioner's brief, his only complaint is that Standard Oil did not take affirmative action to minimize any scheduling conflicts from his Reserve duties. Since the Act imposes no such obligation upon Standard Oil, whether or not § 2021(b)(3) is applied, the Sixth Circuit was correct in dismissing petitioner's complaint.

plain language of the statute, but it would result in onerous and unconstitutional burdens being placed upon reservists' employers.

The petitioner argues that § 2021(b)(3) requires employers to treat reservists absent on Reserve duty as if they were constructively present on the job. (Pet. at 8-9, Brief at 23-24). Thus, petitioner contends that if he would have had the right to work 40 hours had he not been absent on Reserve duty, Standard Oil must afford him that right notwithstanding his absence on the theory that to do otherwise would be a "den[ial] . . . of an incident or advantage of employment" because of his reserve obligations.

This case involves absences for weekend duty. However, the statutory language is not so limited ("*any* obligation") and the legislative history makes it clear that it was meant to apply, at least, to absences for the annual two-week training period (1968 U.S. Cong. & Admin. News at 3421). Accordingly, if petitioner's position were accepted by this Court, employers would be required to treat reservists and National Guardsmen absent on the annual two-week training period and for even longer periods of training[8] as if they were present at work during their absence. Under petitioner's and the government's theory, such reservists and National Guardsmen would be entitled to all "incidents and advantages of employment" accorded during their absence to

[8] In fact, the testimony of Mr. Bradley in 1966 (*infra* at 15) makes it clear that § 2021(b)(3) was meant to protect reservists from discrimination for at least all obligations governed by what was then 9(g)(4) of the Act (now codified as 38 U.S.C. § 2024(d)). As mentioned *infra* at 5, the legislative history of *that* provision shows it was meant to govern inactive or active duty training of up to 90 days.

other working employees, including regular time and overtime opportunities. *Cf. West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980); *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). Many of such "incidents or advantages of employment" including regular time would not be subject to being made up and employers would be required to pay for such incidents or advantages. Such payment would be required at least for the regular time missed during the annual two-week training session. This would result in payments by employers to reservists and National Guardsmen of approximately $700,000,000.00 annually[9] for such regular hours and potential back pay liability in the billions of dollars extending back to 1968.[10] Since employers receive no benefit from such direct payments not received by the public at large (e.g., increased military preparedness through encouraging membership in the Reserve and National Guard) requiring them to bear such huge direct payments would constitute a "taking" for a public purpose without just compensation in violation of the Fifth Amendment to the United States Constitution. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Pete v. United States*, 531 F.2d 1018, 1034-1035 (Ct. Cl. 1976); *Cf. White v.*

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[9] Based upon Total Ready Reserve Strength of 1,270,690 in October 1980, *Official Guard and Reserve Manpower Strength and Statistics Office, Deputy Secretary of Defense (Reserve Affairs)* Report No. 1147/1148 (October 1980) at 8, and applying October 1980 figures for average hourly wages for production and non-supervisory workers of $6.81 per hour. *Employment and Earnings*, U.S. Department of Labor, Bureau of Labor Statistics, Vol. 27, No. 11 (November 1980) at 104.

[10] There is no statute of limitations contained in the Act, and § 2022 forbids the application of a state statute of limitations.

*Associated Industries of Alabama, Inc.*, 373 So.2d 616 (Ala. 1979).[11]

Recognizing the constitutional problems from such a construction, petitioner, the government, and the Fifth Circuit (*West v. Safeway Stores, Inc.*, 609 F.2d 147 (1980)) have argued that, notwithstanding the unqualified language of the statute, the obligation to treat the reservist as if he were "constructively present" (*West, supra*, at 150) only exists where the employer can "reasonably accommodate" the reservist, and where such accommodation is not possible, the obligation disappears. (Pet. at 9 n. 6, Brief at 23-24, *West, supra*, at 150 n. 8.) Thus, petitioner, the government, and the Fifth Circuit not only create the "affirmative action" obligation and "constructive presence" concept out of whole cloth cut fresh for the occasion but then create a theory of "reasonable accommodation" to avoid the obvious constitutional problems generated by the "constructive presence" concept.[12] Under their theory the plain language of § 2021(b)(3) that:

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[11] While this Court has upheld state statutes requiring employers to compensate employees for "brief period[s]" up to four hours spent voting (*Day-Brite Lighting v. Missouri*, 342 U.S. 421 (1952) and requiring employers to pay employees absent on jury duty the difference between their regular wages and their jury pay (*Dean v. Gadsden Times*, 412 U.S. 543 (1973)), those decisions imply that requiring payment for extensive periods of time for which the employer receives no special benefit, such as would be involved with this statute, would raise serious constitutional questions.

[12] If petitioner were correct in asserting that § 2021(b)(3) applies to the time period of a reservist's absence for military duty, it is hard to understand how petitioner, the government, the Fifth Circuit, and the District Court below can take the position that their "constructive presence" concept only applies to weekend duty and not to the summer training session or other longer absences given the legislative history and

(Footnote continued on following page)

> "Any person . . . shall not be denied . . . [any] incident or advantage of employment because of *any* obligation as a member of a Reserve Component of the Armed Forces." (Emphasis added.)

becomes:

> "Any person . . . shall not be denied . . . [any] incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces [so long as any such person's employer may prevent such denial by taking affirmative action to reasonably accommodate such obligation, but not otherwise]."

Clearly, if Congress had intended § 2021(b)(3) to mean what petitioner, the government, and the Fifth Circuit says it means, it could have drafted that section to so provide. However, nothing in the language of the statute or its legislative history even remotely suggests Congress intended such a construction.[13]

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[12] *continued*
the plain language of the statute that discrimination is prohibited "because of *any* obligation as a member of a Reserve component. . . ." (emphasis supplied).

[13] The decision of the Seventh Circuit in *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir., 1979), *cert. denied*, 444 U.S. 1073 (1980) also imposed an affirmative action obligation on employers under § 2021(b)(3) and is erroneous for that reason as well as for the initial decision to apply § 2021(b)(3) rather than § 2024(d) to the time period of a reservist's absence. The decision of the First Circuit in *Carlson v. New Hampshire Department of Safety*, 609 F.2d 1024, *cert. denied*, 446 U.S. 913 (1980), was correct to the extent that it found Carlson's transfer *after his return because* of his Reserve obligations to be a violation of § 2021(b)(3). However, the language in the second full paragraph on page 1027 of the opinion, to the extent it applies to incidents or advantages of employment occurring *during* the reservist's absence, is overbroad.

## CONCLUSION

The Sixth Circuit was correct in finding that § 2021(b)(3) was meant to prevent discrimination against a reservist during the time period he is on the job between his Reserve absences and that such section requires only equal nondiscriminatory treatment and does not require affirmative action by an employer.

The construction of the Act urged on behalf of the petitioner by the government is without support in the language of the statute or its legislative history and its application would result in a violation of employers' Fifth Amendment rights.

Accordingly, the decision of the Sixth Circuit should be affirmed.

Respectfully submitted,

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